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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 485

LOCAL 20, TEAMSTERS, CHAUFFEURS AND
HELPERS UNION, ETC., PETITIONER,

vs.

LESTER MORTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1963
CERTIORARI GRANTED DECEMBER 9, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. A]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 14984

**LESTER MORTON, d/b/a Lester Morton Trucking Company,
Plaintiff-Appellee,**

vs.

**LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS UNION,
an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers of
America, Defendant-Appellant.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION**

Appellant's Appendix—Filed May 21, 1962

[File endorsement omitted]

[fol. 1]

**IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

No. 8222.

LESTER MORTON, dba, etc.,

vs.

LOCAL 20, TEAMSTERS, and LAWRENCE EVANS, et al.

EXCERPTS FROM DOCKET ENTRIES

Date	Proceedings.
6-22-59	Complaint filed. Summons issued. Four copies of summons and four copies of complaint to U. S. Marshal.
.	
[fol. 3]	
10-11-60	Motion of defendant to dismiss filed. Memorandum in support of motion attached. Mailed 10-11-60.
10-21-60	Memorandum of plaintiff in opposition to motion to dismiss filed. Mailed 10-20-60.
10-24-60	Reply memorandum of defendant re motion to dismiss filed. Mailed 10-24-60.
12-9-60	Order overruling motion to dismiss and plaintiff is granted leave to file amended complaint within 15 days filed. FLK Copies 77d to Flynn and Gallon.
12-16-60	Second amended complaint filed. Jury demand attached. Copy mailed to Gallon.
1-30-61	Notice to attend pre-trial conference 3-17-61, mailed.

Date

Proceedings.

3-17-61 Pretrial order filed. FLK Answer filed 1-4-60 to be considered answer to second amended complaint. Assigned for trial 4-24-61. Copies 77d to Moan and Gallon.

[fol. 6]

1-26-62 Order entering judgment for plaintiff in the sums of \$19,619.62 as compensatory damages and \$15,000.00 as punitive damages for a total of \$34,619.62 and costs in the sum of \$490.44 filed and entered. FLK 17 Copies 77d to Flynn, Hafer and Gottschalk.

[fol. 14]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed January 4, 1960

1. For answer to the Amended Complaint of the plaintiff as to the allegations contained in paragraph 1 of said Amended Complaint, defendant admits that there is no diversity of citizenship between the parties.

2. With respect to the allegations of the Amended Complaint contained in paragraph 2 of plaintiff's Amended [fol. 15] Complaint, defendant admits that plaintiff is engaged in the trucking business as a sole proprietor under the name of Lester Morton Trucking Company at Tiffin, Ohio.

3. Further answering, defendant denies that the amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000).

4. Defendant admits that it is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

5. Defendant denies the allegations in paragraph 5 of plaintiff's Amended Complaint.

6. Defendant denies the allegations of paragraph 6 of plaintiff's Amended Complaint.

7. Defendant denies the allegations of paragraph 7 of plaintiff's Amended Complaint.

8. Defendant denies the allegations of paragraph 8 of plaintiff's Amended Complaint.

9. Defendant denies the allegations of paragraph 9 of plaintiff's Amended Complaint.

10. Defendant denies the allegations of paragraph 10 of plaintiff's Amended Complaint.

11. Defendant denies the allegations of paragraph 11 of plaintiff's Amended Complaint.

12. Defendant denies each and every allegation contained in plaintiff's Amended Complaint not hereinabove specifically admitted to be true or otherwise specifically denied.

Wherefore defendant prays that the Amended Complaint of the plaintiff be dismissed; that the relief sought by plaintiff [fol. 16] be denied and that defendant recover its costs herein.

Law Offices of Jack Gallon, By _____
Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

APPLICATION FOR LEAVE TO FILE MOTION TO DISMISS—
Filed September 28, 1960

Now comes the defendant in the captioned suit and requests the Court for an order allowing it to file the attached Motion to Dismiss for the following reasons:

1. It was not until counsel recently completed his research for the trial brief that he became fully aware of the insufficiency of the amended complaint to state a cause of action and the failure of the amended complaint to invoke the jurisdiction of this Court.

2. Rule 12.(h) of the Federal Rules of Civil Procedure provides that the filing of an answer in this case does not waive the objection by motion that the amended complaint fails to state a claim upon which relief can be granted and [fol. 17] that the Court lacks jurisdiction of the subject matter. Rule 12 (h) provides

“that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

Law Offices of Jack Gallon, By Jack Gallon.

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

MOTION TO DISMISS—Filed October 11, 1960

Defendant moves the Court for an order dismissing the amended complaint in the captioned case since the court lacks jurisdiction of the subject matter and the amended

complaint fails to state a claim upon which relief can be granted.

Law Offices of Jack Gallon, By Jack Gallon, Attorney
for Defendant, 435 S. Hawley Street, Toledo, Ohio.

[fol. 18]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

SECOND AMENDED COMPLAINT—Filed December 16, 1960.

Now comes the Complainant and for a cause of action alleges that:

1) This action arises under one of the statutes of the United States, to wit, the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. A. 145, and that thereunder no diversity of citizenship is required to vest jurisdiction in this court for causes of action of the nature herein set forth.

2) Complainant is engaged in the trucking business as a sole proprietor under the name of Lester Morton Trucking Company at Tiffin, Ohio, and has been so engaged at all times hereinafter complained of, which trucking business, at all times hereinafter complained of, affected commerce within the meaning of the Labor Management Relations Act.

3) The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00).

4) Defendant is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

5) On the 17th day of August, 1956, at about 5:30 o'clock a.m. the defendant, willfully, maliciously and in pursuance of a conspiracy to injure, damage and destroy Complainant's trucking business, caused approximately fifteen (15)

men to appear at the Complainant's business premises and to picket said place of business with many signs, or banners, which stated that defendant labor union was on strike against the Complainant; that the aforesaid picketing by large numbers of men was caused by the defendant to continue until August 21, 1956 on which date an injunction against picketing by more than two (2) men at each entrance was issued by the Common Pleas Court of Seneca County, Ohio; that said picketing by large numbers of men continued in violation of said injunction, and with the knowledge of and under the instructions of the defendant.

6) In causing the business premises of the Complainant to be picketed as aforesaid the defendant organized, promoted, conducted and prosecuted said picketing which resulted in unlawful interference with and obstruction of Complainant's trucking business; that as a result of the aforesaid picketing, the defendant interfered with the conduct of Complainant's business and with his right, and the right of the public to free, unobstructed ingress to and egress from the Complainant's place of business.

[fol. 20] 7) The defendant further unlawfully obstructed and interfered with Complainant's right to freely engage in his normal business activities by, among other things, willfully and maliciously threatening various persons and corporations with which the Complainant had contractual relations, with picketing at their construction sites if they continued to do business with the Complainant.

8) The defendant further unlawfully obstructed and interfered with Complainant's right to freely engage in his normal business activities by, among other things, willfully and maliciously inducing and encouraging and attempting to induce and encourage certain employers, and the employees thereof, having contractual business relations with the Complainant, to engage in a concerted refusal to continue such contractual business relations with the Complainant and to force and require the Complainant to recognize and bargain with the defendant, who was not certified as the representative of the employees of the Complainant.

9) The defendant further unlawfully obstructed and interfered with Complainant's right to freely engage in his normal business activities by, among other things, willfully and maliciously inducing and encouraging the employees of other employers to engage in concerted refusals in the course of their employment to perform services, all for the purpose of forcing and requiring such employers to cease doing business with the Complainant.

10) The mass picketing and secondary boycott activities engaged in by the defendant against the Complainant, as aforesaid, were in violation of the provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A. 145, and caused great damage to the Complainant, in that among other things: (1) He lost numerous truck-[fol. 21] ing jobs as a result thereof from which he would have received substantial profits but for said mass picketing and said secondary boycott activities; (2) Numerous other jobs under contract by the Complainant were delayed; and (3) Nearly all of Complainant's trucking equipment was forced to remain idle during the aforesaid period of time.

11) Complainant has been further damaged by the aforesaid actions of the defendant in that it was necessary for him to retain legal counsel, at considerable expense, to obtain an injunction against said defendant arising out of the actions hereinbefore described.

Wherefore, Complainant prays judgment against the defendant in the amount of Fifty Thousand Dollars (\$50,000.00) as compensatory damages and Fifty Thousand Dollars ((\$50,000.00) as punitive damages for a total of One Hundred Thousand Dollars (\$100,000.00), plus the costs of this action.

Complainant hereby requests trial by jury.

• Flynn, Py & Kruse, Sandusky, Ohio, Attorneys for Complainant.

[fol. 22]

IN DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO

[Title omitted]

Transcript of Proceedings—April 24, 1961

APPEARANCES:

Flynn, Py & Kruse, By John R. Py, Esq., and Melvin J. Stauffer, Esq., in behalf of the Plaintiff.

Goldberg, Previant & Cooper, By Hugh Hafer, Esq., Jack Gallon, Esq., in behalf of the Defendants.

Transcript of Proceedings taken in the above-entitled cause of action, before the Honorable Frank LeBlond Kloeb, United States District Judge, trial commencing at ten o'clock A. M., Monday, April 24, 1961.

**EXCERPTS FROM OPENING STATEMENT BY MR. HAVER,
COUNSEL FOR DEFENDANT**

Finally and in conclusion, we wish to advise the Court that we will in a few minutes serve the plaintiff with an [fol. 23] Answer to the Second Amended Complaint. Technically, the record does not contain an Answer to the Second Amended Complaint. There is in the record an Answer to the Amended Complaint.

This Answer adds one paragraph which was not in the other Answer. That paragraph alleges a res judicata defense. That defense will require only about twenty minutes of evidence, because all we will adduce in support of it is a pleading by the plaintiff which is in all terms identical to the pleading in a state court asking for damages in the same amount and a responsive pleading which we filed in the judgment of the state court, and we ask leave of the Court under Rule 15 to file the Answer to the Amended Complaint raising affirmatively the issue of res judicata which was not specifically pleaded before.

The Court is asked for leave to put in brief documentary evidence which will be required to support our legal arguments which we will make in this area.

That concludes our opening statement, your Honor, but I would be more than happy at this time to answer any preliminary questions which the Court might have either with respect to our legal theories or with respect to the procedure which we intend or contemplate following in the presentation of our case.

The Court: Does the plaintiff desire to make any responsive statement?

Mr. Stauffer: Yes, sir.

RESPONSIVE STATEMENT BY MR. STAUFFER,
COUNSEL FOR PLAINTIFF

We will address our remarks, if the Court please, to the statements of counsel in reverse order, mentioning first his statement with respect to the filing of the Amended Answer. We will object to that for several reasons, the primary one of which is the fact that this Court ordered that pursuant to Mr. Gallon's request at the second pretrial conference that the Answer previously filed be considered the Answer in this case. We have not had the opportunity [fol. 24] to read the Amended Answer. I don't believe it will be necessary.

Secondly, with respect to opposing counsel's suggestion that this case be further delayed, we oppose that most strenuously. We expect to do all in our power to complete the case in the time allotted.

With respect to the jurisdiction of this Court to award damages for torts in the state common law area, I think our trial brief adequately covers that question.

The Court of Appeals in this Circuit has said that even though the plaintiff fails on the Federal grounds—and we do not expect to do so here—the Court has jurisdiction to grant damages in or on state common law alone and we are prepared to go forward accordingly and with the full case.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I will say to you gentlemen that I am somewhat handicapped. I have been on the Bench nearly 24 years and I have never failed to meet an assignment of a case for trial during that time, although counsel have frequently failed me. I thought I might have to be absent today. I was in bed for several days over the weekend. So that I am here under a handicap. The cold that I have now has affected my hearing. You gentlemen will have to speak loudly enough so that I will not have to have you repeat what you have said.

In connection with counsel's opening statement, I want to review for a moment the situation we have because the request to file an Answer to the Second Amended Complaint is rather embarrassing at this time.

Let me call counsel's attention to the history of this case.

The Complaint was filed on June 22, 1959, and a motion to separate the counts was filed by the defense on July 14th. At the same time, another motion was filed by the defense to dismiss the three individuals who in [fol. 25] the original Complaint had been named parties defendant. Then on July 22nd there was a motion to dismiss, or a memorandum filed in support of the motion to dismiss. On August 5th a brief in opposition to the motion to separate counts. On September 8, 1959, the Court overruled the motion to separate the counts and the order is so filed.

On the same date the Court sustained the motion to dismiss the individual defendants and an order was filed bearing that same date, September 8, 1959.

The Amended Complaint was filed on September 25th. Then a motion was made by the defense to strike from the Amended Complaint. That was filed on October 24th. On October 27th a memorandum in opposition to the motion to strike. On November 20th the motion to strike was overruled and an order filed accordingly.

Then on December 24th an application was filed for default judgment on the ground that the defendant had failed to file an Answer to the Amended Complaint. That was on December 24th, as I say. I don't know whether

an order was ever entered sustaining that motion. The defendant was in default.

On December 28th the defendant filed a motion to vacate the default judgment and asked leave to plead. On December 31st there was a motion in opposition to the defendant's motion to vacate judgment.

On January 4th the Court sustained the motion to vacate the default entry and granted leave to the defendant to file an Answer. On January 4th the Answer was filed as of that same date.

Now, there was a pretrial conference, a notice of pretrial on September 12th, 1960, and the case came on for pretrial. At that pretrial counsel for the defense moved the Court for leave to file a motion attacking the jurisdiction of the Court, and that was filed on September 28th [fol.26] the day of the pretrial. The Court granted the motion and the assignment was vacated and the defendants were granted leave to file a motion to dismiss the Amended Complaint. Motion to dismiss was filed on October 11th. This was all in 1960.

October 12, 1960, memorandum in opposition to motion to dismiss, and October 24th motion to dismiss, reply memorandum motion to dismiss, reply memorandum. On December 9th the motion to dismiss was overruled. On December 16th the Second Amended Complaint was filed.

Then there was notice served of pretrial to be had on January 4th. I am not certain about that date. There seems to be no entry here in connection with that. At that pretrial a consent—at that pretrial an order was entered, at the consent of counsel for the defense, to the effect that the Answer to the original Complaint should be the Answer to the Second Amended Complaint. That is here some place. I have a note to that effect.

Mr. Stauffer: That date is March 17th, if the Court please.

The Court: March 17th. I knew there was an order here of that kind. There are so many documents here that I can't put my finger on it. I think Mr. Gallon will recollect that, that it was agreed that the Answer to the Amended Complaint should be the Answer to the Second Amended Complaint.

Now, although the pretrial orders called for pretrial briefs, the defense has never filed a pretrial brief. I have had two pretrial briefs filed by the plaintiff. So that this legal argument that you are putting up at this time might well have been done in the pretrial brief, and I feel that if it occasions a delay in the trial that the Court should not permit it.

Mr. Hafer: I am advised that the defense did file a pretrial brief raising the issues of the legality of the in-[fol. 27] ducement of supervisors and management representatives. I personally have had a chance to review that brief from the defense file.

The Court: At the first pretrial it was stated by counsel for the defense that he desired his memorandum on the motion to dismiss to be his pretrial brief.

Mr. Hafer: I believe that is correct, your Honor, and that memorandum also raised the res judicata issue by way of memorandum which I have asked the Court to allow an amendment of pleadings on. We are embarrassed by it, too, your Honor. It should have been raised in the previous pleading rather than in a memorandum, but in the interest of justice under Rule 14 we ask—

The Court: (Interposing) I understand that, but we have been at this case since July of 1959. The Court has been very patient with numerous motions and two pretrials in open court, and the Court doesn't feel that in justice to the opposing side that he ought to permit any delay now. What do you think?

Mr. Hafer: The res judicata defense issue, your Honor, which is the only issue raised by the amended pleading will require not in excess of twenty minutes of trial time.

The Court: I don't know about that, of course; I have not seen the Amended Answer that you—

Mr. Hafer: (Interposing) I can assure the Court that our evidence will consist solely of three documents, a plaintiff's Complaint in the state court action, a responsive pleading by these defendants, and a journal entry, all of which will be in the form of certified documents. That will be the sole evidence in connection with the issue which we intend to raise. It will not require, even if the adducement of the evidence is opposed, more than twenty minutes of this Court's time.

[fol. 28] The Court: Are you willing to allow that to be filed?

Mr. Stauffer: We are—definitely not, your Honor. We are prepared to go ahead on the issues as made.

The Court: I haven't seen it. I don't know what it is going to raise except that counsel has made the statement that it will take twenty minutes, an additional twenty minutes of evidence.

Mr. Stauffer: I haven't read it. I don't think it is necessary at this point. We have sufficient issues made over many months. I think it is mandatory that we proceed with those issues.

Mr. Hafer: I don't see how counsel can argue and the Court can consider its ruling until it reads the Paragraph 13.

(Thereupon, Mr. Hugh Hafer handed a document to the Court.)

The Court: I believe that was argued in the motion to dismiss.

Mr. Hafer: It was, your Honor.

The Court: And at that time it was brought out that the Common Pleas Court of Seneca County—I believe it was Seneca County—had discovered an opinion that had just been promulgated by the United States Supreme Court in the San Diego Building Trades Council case, and the Court there felt it stripped him of any further right to proceed and he dismissed the case without prejudice; am I correct about that?

Mr. Stauffer: Yes, sir, that is right. In our memorandum in opposition to the latest motion to dismiss, we summarized what appeared to us to be the points that opposing counsel was raising at that time, and the first one was that the prior state court action, in which the plaintiff and others were parties, is a bar to this action, which is based upon the same subject matter, and the opposing counsel in his reply memorandum agreed that that was [fol. 29] one of the issues, and this Court, of course, allowed us to file an Amended Complaint.

Mr. Hafer: I am not proposing to take the Court's time arguing whether our affirmative defense is meritorious. We

will do that in the brief after the trial, but the colloquy here makes it perfectly plain, your Honor, that this issue has been in the case for a long time.

Now, we are embarrassed because it was raised by a memorandum rather than by a pleading. All we are asking this Court to do is to allow us to put in proper pleading shape an issue which has been in the case for a long time, which everyone has been appraised of, so that we are not under the Federal Rules waiving that issue by procedural technicality, namely, that we raised it by memorandum rather than by a paragraph in our Answer or by motion.

All we ask this Court to do is to allow us to plead the argument so that our evidence can be adduced and we are not in a position of waiver on it. We are not, as counsel by his own admission indicates, raising something new at the 11th hour, nor are we taking him by surprise by making this contention. This contention was made a long time ago, although technically not according to procedure. All we ask this Court to do is under Rule 15 give us a chance to put it in proper procedural shape so that the Court at its leisure can consider it when it is argued on briefs. Otherwise, we would be precluded from arguing this issue which we honestly believe to be substantial.

The Court: Counsel will agree that it is rather belated, will he not?

Mr. Hafer: Yes, of course I do, your Honor, but it has been in the case for a long time. Procedurally it has not been here.

[fol. 30] The Court: It was in the case, yes, in the motion to dismiss, and the Court overruled that motion.

Mr. Stauffer: If the Court please, we are being taken by surprise. We thought opposing counsel was satisfied on the issue, not having raised it in the pleadings earlier. We are prepared to proceed, and I think we must.

The Court: I don't believe I will permit it to be filed at this time. In view of the objection of the attorney for the plaintiff, I think it would be wrong.

You may proceed.

Thereupon, the Plaintiff called as a witness, Mr. IRWIN MOWRY, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Mr. Stauffer: This witness is being called under Rule 43, I believe, as an officer of the defendant.

Mr. Hafer: He is not an officer of the defendant and we will object to his being called as an officer.

Q. State your name, please.

A. Irwin Mowry.

Q. Your address?

A. 917 West Cole Road, Fremont, Ohio.

Q. How long have you lived there?

A. Two years.

Q. Where did you live before that?

A. At Route 1, Bloomville, Ohio.

Q. How long did you live there?

A. Eight.

Q. Eight years?

A. Eight.

[fol. 31] Q. Pardon me?

A. Eight years.

Q. Are you married?

A. Yes, sir.

Q. Any children?

A. One.

Q. What is your present employment?

A. I'm organizer for Teamsters Local No. 20.

Q. How long have you worked for Teamsters Local 20?

A. Since June, 1956.

Q. Who did you work for before that?

A. Teamster Local No. 625.

Q. Is Teamsters Local No. 625 still in existence?

A. It is not.

Q. What happened to it?

A. It merged with Local No. 20.

Q. How long did you work for Teamsters Local 25?

A. 625.

Q. 625. Approximately.

A. Since 1950.

Q. And what did you do before that?

A. I was a truckdriver.

Q. What did you do in 1956?

A. I was,—

Q. (Continuing) What were your duties then?

A. I was business agent for Teamsters Local No. 20.

Q. And as a business agent what were your duties?

A. Well, I organized, serviced various accounts that we had and negotiated contracts.

Q. What do you mean by "organized?"

A. Well, organize new places where we had no members and check and make sure where we did have members that they were union members and paid up.

Q. In 1956 did you work out of Fremont or out of Toledo?
[fol. 32] A. I worked out of the Fremont office.

Q. Teamsters Local 20 has an office there in Fremont?

A. A sub-office, yes, sir.

Q. Was there any other business agent for Teamsters Local 20 working out of the Fremont office in 1956?

A. Assigned directly to the office?

Q. Yes.

A. One.

Q. Who was that?

A. Frank Kennedy.

Q. Who were the business agents for Local 20 working out of the Toledo office in 1956?

A. All of them?

Q. To the best of your recollection?

A. Well, there was the president, Lawrence Steinberg; secretary, Wesley Mencke. Then there was Edward Sulinger, William Herzig, Norman—Newman Walton, Homer Moller, Lawrence Evans or Larry Evans, William Reagan, J. N. Jamieson, John Cassidy and Ivo Irwin.

Q. In 1956 what was the geographical area of Teamster Local 20 for which it was responsible?

A. An eleven county area in Northwestern Ohio.

Q. And was Seneca County one of those counties?

A. Yes, it was.

Q. Sandusky County?

A. It was.

Q. Lucas County?

A. Yes.

Q. Is Plaintiff's, Mr. Morton's, office in Seneca County?

A. Yes.

Q. Have you ever visited his premises?

A. Many times.

Q. His property?

A. Many times.

[fol. 33] Q. Did you visit there in 1956?

A. Yes.

Mr. Hafer: Your Honor, we will object at this time and ask for a ruling on the question of calling this witness as an officer of the defendant under Rule 43. I believe now that the testimony is in, it is quite clear that he is not an officer and counsel is bound by answers he may receive.

Mr. Stauffer: I believe the witness stated that he was an officer.

The Court: Are you now an officer?

A. I am not.

The Court: Have you ever been an officer?

A. Never of Local 20, no, sir.

Mr. Stauffer: We will contend, your Honor, that a business agent of a union is an officer of the union.

The Court: I have no authority on it. You may proceed, but you may be bound by what he says.

Mr. Stauffer: Was the last question answered?

(Thereupon, the last question and answer were read, as follows: "Q. Did you visit there in 1956? A. Yes.")

By Mr. Stauffer:

Q. In the early part of 1956 do you know whether any of Morton's employees were members of Teamsters Local No. 20?

A. Yes.

Q. Do you know about how many truck driving employees Morton had in early 1956?

A. Well, if you are speaking of early Spring I would say about four or five.

Q. Then coming to the summer of 1956.

A. It increased.

Q. To about how many?

A. Approximately 40. That is an approximate figure because I don't remember.

Q. Do you know whether or not any of those truck drivers [fol. 34] ing employees were members of Defendant's Local 20 in 1956?

A. Yes.

Q. Do you know about what part of them in the summer-time when there were about 40, as you testified?

A. They all became members when they were there any length of time.

Q. And that was the situation in the summer of 1956?

A. That is correct.

Q. Do you know whether or not those members paid dues to Teamsters Local 20?

A. They did.

Q. How did you know that?

A. Because I collected the money.

Q. In the early part of August, 1956, did Morton have a contract with Teamsters Local 20?

A. I don't remember when the first contract was negotiated.

Q. So that you don't know whether there was one?

A. I couldn't honestly say.

Q. All right.

Mr. Gallon: Does counsel have a copy of this exhibit?

Mr. Stauffer: We will obtain one.

By Mr. Stauffer:

Q. I hand you what has been marked for identification Plaintiff's Exhibit 1 and ask you whether or not that is a fair representation of plaintiff's place of business and office?

A. It is not a complete view of all the entrances to the place. There is another entrance to the grounds that isn't shown on this picture.

Q. What do you see in that picture?

A. An aerial view of the garage, Mr. Morton's home and the parking lot of the trucks and the small dock that he had built for handling Michigan Motor Freight.

Q. Do you see his office?

[fol. 35] A. I do.

Q. Do you know whether or not Morton has any other office or garage?

A. No, I don't.

Q. What was the situation in 1956, if you know?

A. There was none that I knew of.

Q. Referring to this exhibit where was the other entrance you referred to?

A. Right here (indicating).

Q. You are indicating further east?

A. Yes; just past this building it is possible to come across here (indicating).

Q. Would you place or mark the corner of the picture in the direction where you say there was another entrance and initial it?

A. Well, it was here. I would have to mark it here (indicating).

Q. All right.

A. I will put an initial there (indicating).

Q. Mr. Mowry, do you know whether that other entrance that isn't shown was on Mr. Morton's property or somebody else's?

A. I don't know who owned the property. I don't know where Mr. Morton's property line was at.

Mr. Stauffer: The plaintiff will now move that this now be introduced into evidence.

The Court: Without objection it will be admitted.

Mr. Hafer: There is no objection to that, your Honor.

By Mr. Stauffer:

Q. Mr. Mowry, did you take part in any negotiations on behalf of Teamsters Local 20 looking towards obtaining a contract with Morton in 1956?

A. I attended one meeting, yes, sir.

Q. Where was that meeting?

A. At the Teamsters' Hall in Fremont.

Q. About when did that take place, if you know?

A. I don't remember the date, sir.

[fol. 36] Q. If Morton's employees later struck was this meeting before or after the strike?

A. That meeting was before the strike.

Q. About how long before the strike, if you know?

A. Oh, a few days. I don't know.

Q. Who was there?

A. You were there, for one, and Mr. Morton was there, Larry Evans was there, I was there, and a committee composed of,—I don't know, one, two or three; I don't know how many was there from the employees. I don't remember.

Q. Did you attend the prior meeting of just the employees of Morton and the representatives of Defendant's Local 20?

A. Prior to that meeting?

Q. Yes.

A. Yes, sir.

Q. When did that meeting take place in reference to the one that you just testified about?

A. Quite some time before that. I would say a minimum of two weeks.

Q. And who was at that meeting besides Morton's employees?

A. Larry Evans and myself, I believe.

Q. Anyone else to your recollection?

A. Not that I can recall.

Q. About how many of Morton's employees were there?

A. I would be strictly guessing because I don't remember the exact number, but I would say 14 to 16.

Q. What was the purpose of that meeting?

A. To determine what the employees wanted in a contract with Lester Morton.

Q. Did anyone preside at that meeting?

A. You mean have sole control of the meeting?

[fol. 37] Q. No, not sole control, but did anyone stand up and state the purpose of the meeting and conduct the meeting?

A. Well, it was jointly between Evans and myself.

Q. Was anything decided at that meeting?

A. There were certain things which I can't recall. I mean I don't recall all that went on.

Q. Can you recall anything that was decided at that meeting?

A. They asked for an increase in pay; they asked for showup time, too.

Q. By "they" you mean Morton's employees?

A. Yes, I am speaking of Morton's employees, and a different method of computing the overtime.

Q. Was anything decided as to what you would do or how you would try to get those things?

A. Well, at a meeting such as that the employees present their demands and then it is customary to put together a proposal to the employer, which was done.

Q. Mr. Mowry, did you attend the meeting of Morton's employees at which a strike vote was taken?

A. I did.

Q. Was that at this meeting you are presently testifying about?

A. No, sir.

Q. When did the strike vote meeting take place?

A. The exact date I couldn't tell you.

Q. But it took place before the strike?

A. It was either one of two days before the strike.

Q. It didn't take place after the strike?

A. No, sir.

Q. So that this is the third meeting you have testified you attended?

A. I attended many meetings.

Q. But you testified about three thus far?

A. At that particular time, yes.

[fol. 38] Q. With regard to the strike vote meeting, you were there?

A. I was there.

Q. Was any other business agent from Teamsters Local No. 20 present there?

A. Lawrence Evans was there.

Q. Any other business agents?

A. Not that I can recall.

Q. And where did that take place?

A. At Teamsters' Hall in Fremont, Ohio.

Q. And about how many employees of Morton were there?

A. Around 30.

Q. What was the purpose of that meeting?

A. It called for just that, a strike vote.

Q. And who conducted that meeting?

A. Mr. Evans.

Q. Was the strike vote taken?

A. It was.

Q. How was it taken?

A. By secret ballot.

Q. What was the result?

A. Again, I would have to be giving approximate figures, but I believe that there was 20 votes for the strike and 5 voted against the strike and two or three didn't vote, left blank ballots.

Q. I thought you testified it was a secret vote.

A. It was.

Mr. Hafer: I object. He is impeaching his own witness.

By Mr. Stauffer:

Q. Was that result announced there at the time, Mr. Mowry?

A. It was.

Q. Was it decided as to when the strike would commence?

A. That I don't recall.

[fol. 39] Q. Did a strike of Morton's employees in fact commence thereafter?

A. There did.

Q. About how long after that meeting did the strike take place?

A. I don't remember whether it was a day or two that elapsed in there.

Q. What month was that?

A. August.

Q. Of what year?

A. 1956.

Q. So that the strike of Morton's employees commenced in the month of August, 1956?

A. That is correct.

Q. What time of the day did the strike commence?

A. In the early morning.

Q. Do you happen to recall what day of the week that was?

A. No, I don't.

Q. To refresh your recollection, was it Friday, the last working day of the week?

A. I don't remember what day it was.

Q. All right. Did you appear at Morton's property the first day of the strike?

A. I did.

Q. About what time of the day did you appear?

A. Approximately six A. M.

Q. What did you see when you got there other than the buildings, and so forth?

A. The employees were starting to congregate across the street, over at the root beer stand across the street.

Q. How many of them were there?

A. Well, again, I didn't count, but I would say,—

Q. (Interposing) Approximately how many employees were there?

[fol. 40] A. When I got there?

Q. Yes.

A. Five or six.

Q. And how long did you stay?

A. Until about nine o'clock.

Q. What was the most or the highest number that were there at one time during your stay there from about six to nine A. M.?

A. I couldn't answer exactly; I didn't count them.

Q. Approximately.

A. Well, most of them come and went during that time.

Q. Would you answer the question if you can? What was the approximate number that were there at one time between six and nine A. M. the first day of the strike?

A. Well, when you say "there" do you mean both places, across the road and at the premises?

Q. Yes.

A. Thirty.

Q. What was across the road?

A. A root beer stand and a parking lot. The boys drove in there and parked their cars.

Q. Does that root beer stand appear in Plaintiff's Exhibit 1?

A. It does. (Indicating.)

Q. Did you return again that day, Mr. Mowry?

A. I was,—I may have left before nine o'clock and then came back, but I don't believe I was there after nine o'clock.

Q. Do you know whether or not any of Morton's trucking employees, or truck driving employees, worked that first day of the strike?

A. Not to my knowledge.

Q. Do you recall whether the second day of the strike was a Saturday or Sunday or a regular work day?

A. I couldn't answer that. I don't remember whether [fol. 41] it was,—I know it was close to the weekend, but I don't know what day of the week it started on.

Q. You did go back to the Morton property following the first day of the strike?

A. I was back there and served on the picket line duty from approximately 11 o'clock to 7 o'clock A. M. the second day of the strike.

Q. What was the greatest approximate number of pickets that you observed there at any one time during that shift of yours the second day of the strike?

A. Well, there was three of us on duty, and when you'd change shifts there would be six. There was the three that was coming and the three that was leaving.

Q. How long did the strike last?

A. I don't remember the exact length of time. I don't know that, sir.

Q. Approximately.

A. Again, I wouldn't know that because I left the picket line and wasn't around it.

Q. Was it longer than one week?

A. Yes.

Q. Was it longer than two weeks?

A. I couldn't answer that; I don't know.

Q. All right. You testified that the plaintiff, Mr. Morton, did meet with you prior to the strike?

A. Yes.

Q. What was the purpose of that meeting?

A. To negotiate a contract.

Q. Do you recall when that took place in reference to the first day of the strike?

A. I know there was more than one meeting, but I couldn't tell you the exact dates, how long before or anything like that.

Q. Do you know whether or not Mr. Morton met with you and other business agents the day before the strike?

[fol. 42] A. I don't know just exactly if it was just the day before the strike.

Q. But Mr. Morton did meet with you at least once before the strike?

A. Yes, more than once before the strike.

Q. And as of the time the strike commenced had he refused to meet with you again?

A. I wasn't conducting the negotiations; I couldn't answer that.

Q. You don't know?

A. No.

Q. But you were there?

A. In and out.

Q. I see. Mr. Mowry, do you know whether or not any court action was taken or requested with respect to the strike about which you are testifying?

A. A temporary injunction was issued. There was a court action in the Seneca County Common Pleas Court.

Q. I hand you what has been marked Plaintiff's Exhibit 2 for identification and ask you to look at it, please.

By Mr. Stauffer:

Q. Mr. Mowry, have you seen a duplicate of Plaintiff's Exhibit 2 prior to today?

A. I would have to say I don't think so.

Q. You don't know whether or not you were served with a copy of it by a Sheriff sometime in the past?

A. I was served with a copy, but I wouldn't say that was an exact copy of it.

Q. What was it you were served with a copy of?

A. Well, our attorney handled it. I turned it over to him. I mean I—

Q. (Interposing) Did you read it at that time, at the time you received it?

A. Yes. I was named as a defendant.

[fol. 43] Q. When was this that you received this thing we are talking about?

A. I don't remember the exact date.

Q. Well, what year was it? It had to do with this strike you are testifying about, did it not?

A. Yes.

Q. Do you recall about how long after the strike commenced it was you received this?

A. No, I don't.

Q. Approximately.

A. It would be a guess, pure and simple. I don't know.

Q. Would it have been less than a week?

A. No, it was greater than a week.

Q. You are sure about that?

A. I believe. I am not sure. I said I don't remember.

A. All right.

Mr. Stauffer: We would like to move that this be introduced into evidence.

Mr. Hafer: We object to the receipt of the exhibit. There has been no foundation laid for it and there is no showing of its relevance to this particular case or the circumstances under which it was obtained.

The Court: What is the document? I don't know what it is.

Mr. Stauffer: If the Court please, it is a certified copy of the restraining order issued by the Court of Common Pleas for Seneca County.

A. If that is what it was, I was served with it.

The Court: It will be admitted.

By Mr. Stauffer:

Q. What was your understanding, Mr. Mowry, of this court order that you received back in 1956?

A. Actually, I wasn't involved in the thing and wasn't [fol. 44] near the picket line other than to drive down the road there.

Q. But you were a defendant in this lawsuit in the Seneca County Common Pleas Court, were you not?

A. That is correct, but I was represented by counsel.

Q. And you were served with a copy of this order?

A. That is correct.

Q. And what was your understanding of what that order required you to do or not to do?

Mr. Hafer: The order, your Honor, speaks for itself. We object to that.

The Court: I think that is true.

The Court: Did you read the order, Mr. Mowry?

A. Not that I recall. I turned it over to the counsel.

By Mr. Stauffer:

Q. Mr. Mowry, with regard to this strike against Morton did you visit or go to the property of any of Morton's customers or suppliers during the strike?

A. I went to the Louis O'Connell Company one time or maybe twice during the strike, but after the second day I had nothing whatever to do with the strike. I went there on other duties.

Q. You went where on other duties?

A. Louis O'Connell Company. There are members there.

Q. When did you go to the Louis O'Connell Company?

A. I believe—and again this happened five years ago—that I was there the next day.

Q. The next day after the strike commenced?

A. That's right, after the start of the strike.

Q. What is the Louis O'Connell Company?

A. It is a building supplier, ready-mixed concrete, and I think they still handled coal.

[fol. 45] Q. Where is it located? In what city is it located?

A. Tiffin.

Q. And the O'Connell Company was a customer or a supplier of Morton at that time?

A. They were not a supplier of Morton's; they did—or Morton did some trucking for them.

Q. Describe that trucking. What was the nature of that trucking?

A. Well, I wouldn't be aware of all of it, all of what took place, but I do know that they were hauling sand and crushed stone.

Q. Who was hauling sand and crushed stone?

A. Lester Morton's trucks.

Q. Where was he hauling it?

A. To the ready-mix plant.

Q. Whose ready-mix plant?

A. Louis O'Connell's.

Q. And what did Louis O'Connell have to do with this sand and gravel?

A. Made ready-mix concrete out of it.

Q. Louis O'Connell had a ready-mix concrete plant?

A. That's right.

Q. There in Tiffin?

A. That's correct.

Q. How many employees at that time did Louis O'Connell Coal Company have, approximately?

A. Oh, 14 or 15.

Q. Were any of those employees members of Teamsters Local 20?

A. I would say all of them.

Q. And you say you went there once or twice?

A. In the course of my other duties, yes.

Q. In the early part of the strike against Morton?

A. Well, I made regular weekly visits to the various places.

[fol. 46] Q. Yes, I understand, and one of those visits was during the early part of the Morton strike?

A. Yes.

Q. Do you recall who you talked to there at that time?

A. No, I don't. I possibly talked to our steward, but I don't remember it.

Q. You are not sure you talked to him? What is the answer?

A. I don't remember.

Q. What was the steward's name, if you recall?

A. I wouldn't want to say because I don't remember.

Q. That's all right. During the six months preceding the strike against Morton how many times did you visit the O'Connell property?

A. Approximately once a week.

Q. What did you do on those visits?

A. Well, we had a system set up in our local union that we made an honest effort to visit any place where we have members once a week or once every two weeks.

Q. Mr. Mowry, when you received this court order, Plaintiff's Exhibit 2, which you do not recall having read and which you have testified you handed to your union's attorney, did he give you any advice with respect to it?

A. There was no need of any advice because I had no connection with the strike at that time.

Q. But you were a party defendant to the suit?

A. That is correct; I was named.

Q. And you did appear on the picket line at least one day?

A. Yes.

Mr. Stauffer: You may inquire.

[fol. 47]

Cross examination.

By Mr. Hafer:

Q. Prior to the time of the strike at Morton's in the summer of 1956 you testified that you had members employed at Morton's, and you testified as I recall, Mr. Mowry, that all of them became members after they were there any length of time.

Will you tell us in your own words in a little more detail how many of the truckdrivers were employed at Mor-

ton's in, let us say, July and the early part of August, were paying dues and paying members of Teamsters Local 20?

A. The understanding with Mr. Morton was that after they worked there for thirty days they became members of the local.

Q. You had this understanding prior to the time Local 20 struck in August of 1956?

A. We had that arrangement for quite some time prior to that time, yes, sir.

Q. There was another local, you testified, that was merged with Local 20, Local 625 I believe you said?

A. That's right.

Q. Were the drivers of The Morton Trucking Company members of Local 625 at the time that local was in existence?

A. Yes, sir.

Q. And for what period of time had the understanding with Lester Morton with respect to his truckdrivers joining the then Local 625 been in effect; when did this start?

A. From approximately 1950.

Q. Will you tell us in your own words how it came to pass that after all these years having a majority of these truckdrivers as members of the Teamsters that the strike in August of 1956 occurred? What precipitated that strike? [fol. 48] A. The members themselves requested that we get a contract.

Q. At this time it was Local 20 that was representing them?

A. That is correct.

Q. Prior to that time there had been no written contract?

A. No. We had made many attempts, but we never got one.

Q. How many meetings do you recall attending with Mr. Morton and representatives of the union prior to the strike in July and August of 1956?

A. I couldn't make a direct statement about it; I would say approximately three.

Q. Some of these meetings were in July, were they not?

A. I believe so.

Q. How many meetings with the employees of Morton were held in this same period of time?

A. About three.

Q. One of the meetings was called simply for the purpose of finding out what specific contract proposals should be made by the local union on behalf of these drivers, was it not?

A. That is correct.

Q. And one of the meetings with the employees of Morton Trucking Company was for the purpose of holding—or finding out what specific contract demands should be made on their behalf by Local 20, is that not true?

A. That is correct.

Q. And another of the meetings was for the purpose of holding a strike vote?

A. That is correct.

Q. The strike vote meeting, as I understand your testimony, was only a few days before the strike itself?
[fol. 49] A. That is correct.

Q. Explain the procedure which was followed in the taking of a strike vote, if you will, please?

A. Well, Mr. Evans made a report of the negotiations to date and one of the members,—and I believe there was minutes taken of the meeting. One of the members made a motion and it was seconded and voted on that we take a strike vote. Our regular form, which is a regular strike ballot,—

Q. (Interposing) A printed ballot?

A. A printed ballot.

Mr. Stauffer: I wonder if these documents wouldn't be the best evidence as to what is being testified to here?

Mr. Hafer: I am asking for the procedure now.

The Court: Are those ballots in existence now that you know of, Mr. Mowry?

A. I could be wrong as to the particular ballot that was used now. We have had many strike votes, but it was a paper ballot, that I will say, and I believe they are in existence yet.

By Mr. Hafer:

Q. I show you what has been marked as Defendants' Exhibit A for identification purposes and ask you to look at that and tell us in your own words what Exhibit A consists of.

A. These are a form that we have that people sign when they attend a meeting so that we have a record of who was present at that meeting.

Q. Is this a customary practice of your local union?

A. It is.

Q. Was this practice followed on the night the strike ballot was taken?

A. Yes, it was.

Q. And does Defendants' Exhibit A,—does that exhibit indicate they are attendance cards that were filled out by the members who attended the strike vote meeting?

[fol. 50] A. I believe they are.

Mr. Hafer: We move the Court to receive Defendants' Exhibit A.

The Court: Without objection it will be admitted.

Mr. Hafer: Let the record show that we have provided counsel with photostatic copies of the several documents which constitute the composite Defendants' Exhibit A.

Mr. Stauffer: No objection.

Q. I show you what has been marked Defendants' Exhibit B for purposes of identification and ask you to tell the Court in your own words what that exhibit is.

A. It is the strike ballot as used by our local when we conducted a secret strike ballot.

Q. This is a standard form which is used?

A. This is a standard form which is used.

Q. Now, this particular stapled exhibit which has a number of individual strike ballots has been in the possession of the union since it was taken in 1956, was it not?

A. That is correct.

Q. And has been part of your union's files?

A. It was in Fremont until approximately 1959 and then it was turned over to our attorney.

Q. Is this document which we have marked as Exhibit B, a composite document, the actual paper ballots which were distributed, filled in by the employees of Morton Trucking Company at the strike vote meeting preceding the August, 1956, strike?

A. Yes, sir.

Q. Tell us mechanically what procedure is followed, or was followed, in the distribution and marking of the ballots which compose Defendants' Exhibit B.

A. At all strike ballots two people from the group involved pass out the strike ballots and it is watched very closely that no more than one ballot is given to an individual, and then the same two people collect the ballots after they are marked and they are folded once in the middle, as the crease will show, so that no one can tell how anyone is voting. Then they are collected by the same people who have distributed them. That is our normal procedure.

Q. Are they then counted by the men in charge of the meeting?

A. They are counted by the people that both distributed and collected them in the presence of the men in charge of the meeting.

Q. So that the election observer is a man from the rank and file, a member of the union?

A. Yes, and they were counted in front of the full body of the union.

Q. He distributes the ballots, or the two of them distribute them, pick them up and then they count them?

A. That is correct.

Q. And Defendants' Exhibit B are the strike ballots taken at the strike vote meeting in connection with the Morton strike of August, 1956?

A. That is my belief.

Mr. Hafer: We offer composite Defendants' Exhibit B and wish to state on the record that photostatic copies of the individual ballots which make up the composite exhibit have been afforded counsel for the plaintiff here.

The Court: Without objection they will be admitted.

Mr. Hafer: Is there an objection?

Mr. Stauffer: It has just been admitted.

By Mr. Hafer:

Q. What reason, if any, did Mr. Morton give you in your negotiating meeting with him preceding the strike for declining to sign a contract?

A. Well, his standard argument always was that if we got everybody else signed up he would sign a contract.

[fol. 52] Q. Keep your hand away from your face, Mr. Mowry, so that the Court and the Reporter can hear you. Will you now repeat your answer?

A. His standard argument always was that if we got everyone else signed up that he would sign a contract.

Q. On the day of the strike you have testified previously you personally appeared at Morton's premises at about 5:30 or 6:00 o'clock in the morning, is that correct?

A. That is correct.

Q. How long on that particular day were you there?

A. Until approximately nine o'clock.

Q. In the morning or evening?

A. No, in the morning.

Q. Did you then leave the premises or did you go someplace else about nine o'clock?

A. I don't recall; I may have left and come back.

Q. How long were you at Morton's premises upon your return?

A. I don't believe I was there any later than nine or 9:30 at the very latest.

Q. All right. What was the normal reporting time for Morton's drivers?

A. That depended upon the job they were on. They went to work anywhere from 4:30 or 5:00 to approximately 7, I believe.

Q. On the day of the strike how many drivers were at the premises when you arrived?

A. Four or five.

Q. Did more show up later?

A. Yes.

Q. Now, we have in the record an aerial photograph of the premises of the Morton Trucking Company. I would like to have you put this so that the Court can see it, Mr. Mowry, and tell us while you were at the premises the drivers were standing.

[fol. 53] You testified, you will recall, that some were by the root beer stand and some were in front of Morton's. I would like you to point out for the Court where the drivers were standing at the time you were at the premises on the first day of the strike.

A. When I first got there?

Q. Yes.

A. I was parked right along this line, or that is where they had their cars parked. Right here (indicating).

Q. Now, when you say "right along this line" you are indicating the side of the road by the root beer stand?

A. I am indicating the property of the root beer stand.

Q. There is a wide area around the root beer stand as shown on this photograph. Is that a parking area?

A. That is a parking area.

Q. Were any of those pickets or any of the drivers' cars, their personal cars, parked near or in this parking area of the root beer stand?

A. We were parked in here and over here (indicating).

Q. And you are indicating the parking area around the root beer stand?

A. That is when I arrived in the morning, that is correct.

Q. Were any of the cars belonging to the drivers parked on the other side of this road which would be in the area of the Morton premises, in front of the Morton premises?

A. When I arrived?

Q. Yes.

A. No.

Q. Later on while you were present at the picket line were there cars there?

A. Yes.

Q. Now, you will note, I believe, on this photograph that there are two drive areas leading into the front of Morton's premises, is that correct?

[fol. 54] A. That is correct.

Q. Will you tell us where the drivers' cars were parked that were parked in front of Morton's premises?

A. There is quite a wide space between the curb and there is a ditch which isn't shown on the picture here, and between the curb and the ditch the cars were parked, and my car, my personal car, was parked up here between the pole and the ditch.

Q. You are indicating a telephone pole, are you not?

A. That is correct.

Q. Now, were any of the cars parked in such manner as that they blocked the driveways which are indicated on the photograph?

A. Not at any time when I was there.

Q. You were there about three hours the first day?

A. That is correct.

Q. On the second day you were there, you were there for a seven-hour shift?

A. Eight hours.

Q. An eight-hour shift. Excuse me.

Now, at any time during that eight-hour shift on the second day that you were there on duty were any cars parked in such a manner as to block the driveways indicated?

A. No, sir.

Q. There were cars, however parked in the area adjacent to Morton's premises and off the street between the driveway areas, were there not?

A. That is correct.

Q. Now, during the three hours that you were at Morton's premises on the first day of the strike and during the eight hours that you were at the premises on the second day of the strike were any physical altercations between any of the union agents and any of the drivers?

A. No, sir.

Q. Were there any to your knowledge between any of [fol. 55] the union agents and any of Morton's—Mr. Morton or any of his management people?

A. No, sir.

Q. At any time that you were in the picket line for these two days was there any physical violence against any person?

A. No, sir.

Q. At any time when you were on the picket line during the first two days of the strike did any person physically block, either with his automobile or by standing in the area, the driveways?

A. Not that I know of.

Q. To your knowledge, did any person at any time or in any way block the driveways while you were on duty?

A. Not to my knowledge.

Q. Were you present at the time the Sheriff showed up?

A. I was present the first morning when the Deputy Sheriff came down and he requested that I remove my car from where it was parked, which I did.

Q. Where did you put it?

A. Either on the side of the road or over in the root beer stand; I couldn't say which.

Q. Now, you testified that you went to the O'Connell Coal Company once or twice at the start of the strike, did you not?

A. Yes.

Q. Now, I think the record is somewhat unclear on this point. In addition to the Morton strike you had regular calls at the O'Connell Coal Company, is that correct?

A. That is correct.

Q. But you made at least one specific visit to the coal company in connection with the Morton dispute, did you not?

A. No, I did not.

Q. All right. At any time you made your regular visits [fol. 56] at or around the date of the strike did you discuss with the O'Connell management, any of them, the Morton strike?

A. I probably did.

Q. Do you recall any specific conversation?

A. No, I don't.

Q. At any time that you were visiting the O'Connell Coal Company after the start of the Morton strike did you observe any pickets of Local 20 at the O'Connell Company premises?

A. No, sir.

Q. Do you know or to your knowledge, Mr. Mowry, did Teamsters Local 20 ever engage in picketing at the premises of the O'Connell Coal Company?

A. No, sir.

Q. What did the union seek to achieve by the strike? What was its goal?

A. To get a signed contract.

Q. Covering the truckdrivers whom you had as members?

A. That is correct.

Q. There are two points we want to clear up. No. 1. Did you talk to any of the management representatives at O'Connell Coal Company before the Morton strike with respect to the situation at Morton's?

A. Yes.

Q. To whom did you speak?

A. Howard Magers, Jr.

Q. What is Mr. Magers' position at the O'Connell Coal Company?

A. I believe he is president.

Q. About how long before the strike did your conversation occur with him?

A. Possibly three or four days.

Q. What was the nature of your conversation?

[fol. 57] A. Oh, I told him that we were attempting to get an agreement with Lester Morton and if we didn't get an agreement there might be a strike.

Q. Did he ask you to do anything in the event there was a strike?

A. He said, "In the event there is a strike would you please let me know so that I can get my material hauled."

Q. After the strike was called did you telephone or contact Mr. Magers to advise him of the existence of the strike?

A. I called him on the telephone.

Q. After the strike was started?

A. Yes, sir.

Q. What was the substance of your conversation with Mr. Magers on the telephone?

A. As near as I can recall, I said, "Howard, we've got Lester Morton on strike."

Q. Did you say anything else to Mr. Magers?

A. I may have asked him for his cooperation. I don't remember. I mean I don't remember the exact wording of my conversation.

Q. Those two contacts then are the only ones you had with the O'Connell Coal Company with specific reference to Morton Trucking Company?

A. Yes.

Q. One last point. You testified that Mr. Morton's position with respect to signing a contract before the strike was that he wouldn't sign until you had everyone else signed up?

A. That is correct.

Q. Did Mr. Morton indicate who he meant when he referred to "everyone else"?

A. Yes. He spoke of,—I can't think of the man's name. He is right down the street from him. He had four or five trucks.

[fol 58] Q. A trucking competitor?

A. A small operator with four or five trucks.

Q. The point of Mr. Morton's remark about everyone else was his competitors in the trucking business?

A. Anyone that had a dump truck that operated in that area.

Mr. Hafer: Nothing further of the witness.

Mr. Stauffer: I would like to ask him one or two more questions.

The Court: Very well.

Redirect examination.

By Mr. Stauffer:

Q. Mr. Mowry, are you familiar with the procedure under the Labor-Management Relations Act whereby under certain circumstances the unions may be certified by the National Labor Relations Board as the representative for certain purposes of an employer's employees?

The Court: He may answer it if he knows or if he is familiar with it.

A. Yes.

Q. Do you know whether or not, Mr. Mowry, Teamsters Local 20 or its predecessor Teamsters Local 625 was ever or has ever been certified by the National Labor Relations Board as the representative of the plaintiff's employees?*

Mr. Hafer: We object to the relevancy, materiality and competency of the evidence.

The Court: He may answer if he knows.

Mr. Hafer: May we have a continuing objection to this line of questioning, your Honor?

The Court: You may have it.

Q. You may answer the question.
[fol. 59] A. Restate the question.

The Court: Read the question.

(Thereupon, the last question was read to the witness by the Reporter.)

A. Not to my knowledge.

Q. Mr. Mowry, you have testified that you spoke with Mr. Howard Magers of The Louis O'Connell Coal Company after the strike against Morton began, is that true?

A. That is correct.

Q. You testified that you told Mr. Magers that you would appreciate his cooperation or words to that effect?

A. Again I have to repeat that I don't remember the exact conversation. I did tell Mr. Magers that I would let [fol. 60] him know if there was a strike, which I did. I don't remember the conversation.

Q. And when you did let him know about the strike what did you tell him?

A. I don't remember the exact conversation.

Q. But you have testified here that you asked for his cooperation?

A. I said I might have, I might have, I don't remember the conversation.

Q. But you don't deny that you did speak with him following the strike and that you might have asked for his cooperation?

A. I don't deny that I talked to the man, no.

Q. And that you may have asked for his cooperation?

A. I don't remember what I did say.

Q. But you don't deny that you may have?

A. I may have used words to that effect.

Mr. Stauffer: I think that's all.

The Court: That will be all. We will recess at this point until one o'clock.

Afternoon Session, Monday, April 24, 1961,
1:00 o'clock P. M.

The Court: You may proceed.

Thereupon, the Plaintiff called as a witness, JOHN W. COMBS, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. John W. Combs.

[fol. 61] Q. What is your address, Mr. Combs?

A. I live at 10—9th Street, or Avenue, Tiffin, Ohio.

Q. Do you have any children?

A. No, sir.

Q. You are not married?

A. No, sir.

Q. Are you presently employed?

A. No, sir.

Q. Did you ever work for the plaintiff, Lester Morton?

A. Yes, sir, I used to work for him.

Q. Did you work for Lester Morton in 1956?

A. Yes, sir, I did.

Q. When did you start to work for Lester Morton?

A. The first part of 1956. It has been so long I can't remember exactly the date and month, but in the Spring of 1956.

Q. Speak more distinctly, please.

A. Yes, sir.

Q. After you started to work for Morton did you work for him throughout the year 1956?

A. Yes, sir.

Q. Did you belong to Teamsters Local 20 in 1956?

A. Yes, sir, I did.

Q. When did you join that union?

A. When I first started working there I signed to join the union.

Q. Were you a member of Teamsters Local 20 in the middle part of the summer of 1956?

A. Yes, I was.

Q. What did you do for Mr. Morton?

A. I drove a truck for him.

Q. What kind of a truck?

A. A tandem, what they call a tandem.

Q. What is a tandem?

A. That's a two-axle truck.

[fol. 62] Q. A dump truck?

A. Yes, sir.

Q. Did you attend any meeting of Morton's employees while you were employed there?

A. Yes, I attended a union meeting.

Q. Where was that?

A. In Fremont.

Q. When was that?

A. I forget. It has been so long ago that I can't recall exactly when it was.

Q. Did a strike take place in August, 1956, in which you participated?

A. Yes, it did.

Q. Did this meeting take place before that strike commenced?

A. Yes. We had the meeting in Fremont. It was on a Friday night, I believe, and we come out on strike the next day. I believe it was on a Friday night.

Q. But the meeting took place the day before the strike?

A. Yes, sir.

Q. What happened the day of the strike?

A. Well, we come out on strike that night and the next morning we went out and some of the boys went back to work and some didn't.

Q. Did anybody go back to work that first day of the strike?

A. To my recollection, there was a few trucks come out that morning.

Q. What did you do, Mr. Combs, that first day of the strike, do you remember?

A. I stood on the picket line.

Q. About what time of the day of that first day of the strike did you appear at the Morton property?

A. Around eight o'clock in the morning.

Q. About how many pickets were there at that time?

.

[fol. 63] By Mr. Stauffer:

Q. About how many pickets were there at that time?

A. I would say around 25 men. That is a rough guess; 25 to 30, I would say.

Q. How long did you stay there on that first day?

A. I stayed there the whole day that first day.

Q. About how many hours do you mean, Mr. Combs, when you say you were there "the whole day"?

A. Offhand, I would say around 7 or 8 hours, just guessing.

[fol. 64] Q. And you left about what time?

A. I would say around three o'clock. Well, in the evening is when I left.

Q. Where did you go when you left the picket line?

A. I went home.

Q. Did you appear at Morton's property again during the strike, the duration of the strike?

A. Yes.

Q. And when was that?

A. The next day.

Q. What did you do out there that day?

A. We appeared most every day to stand picket until we got a summons and then they wouldn't allow but so many of us to stay on the picket line. So then we took it in shifts. We stayed, some of us, about eight hours apiece.

Q. Who wouldn't allow you to do what?

A. We was served with a notice that there wasn't but so many allowed—four I think it was—at a time to stand on picket over there.

Q. What kind of a notice was it?

A. It has been so long ago, but it was the Sheriff that served it to us.

Q. Was that a court notice or a court order?

A. Yes, sir.

Q. Did you stay at Morton's premises throughout the second day you appeared there?

A. Not hardly all the day I didn't, no.

Q. Did you do anything else that day with respect to the strike at Morton's?

A. No. It was probably a day or two later when we did go out, some of us did, when we went elsewhere.

Q. With respect to the second day of the strike, Mr. Combs, approximately what was the greatest number of pickets that were present there at any one time?

[fol. 65] A. I would say about—

Mr. Hafer: (Interposing) We object to the question until there is some foundation laid for this; that is, with respect to the meaning of the word "picket." Do you mean truckdrivers or a man carrying a banner? That is something else. At this time there is no foundation in the record. I don't know if the witness understands what he means.

The Court: You said that on the first day of the strike there were about 25 men present at Morton's premises or in the vicinity?

A. Yes.

The Court: Do you mean pickets?

A. It was the truck drivers that was working for Mr. Morton.

The Court: Were they all carrying signs?

A. Some was carrying signs. We had signs up there, and some was just sitting there. Just a few would carry signs at a time.

The Court: Now he has asked you about the second day.

A. Yes.

The Court: He has asked you how many men appeared there as pickets then.

A. To my knowledge, I would put it at about the same amount as the first day.

By Mr. Stauffer:

Q. When did you again appear there in addition to the first two days?

A. I don't know for sure, but I don't believe I come out the third day, but I was out the next day after that, and I believe that is the day we got the order.

Q. The order from the court?

A. Yes.

Q. Did you stay at the Morton property all day that day?

A. No, not all day I didn't.

Q. Where did you go then?

[fa] 66] A. I went back home. There was a sign for us to stay so many hours at a time, and then I would go home and stay there until my time came up to stand picket.

Q. What was the largest number of men you observed at the Morton property that third day you were there?

A. After we got the service paper from the court?

Q. Yes.

A. The largest number I seen after that was about six to eight at a time, at one time.

Q. Did you go any place else, and did you do anything any place else with respect to this strike?

A. Yes, sir.

Q. All right. What did you do?

A. We went out to France's Stone Quarry.

Q. Can you give us the full name of that company?

Can you give us the name of it or what it does?

A. It is a stone company, but I don't remember anything else about it.

Q. You mean the name of the company is France? Would that be the France Stone Company?

A. Yes, I think that's it.

Q. And where is that located?

A. It is out from Tiffin, Ohio; I would say around eight miles from Tiffin.

Q. Would that be near Bloomville, Ohio?

A. Yes. He has a quarry there, I believe.

The Court: Was this on the third day of the strike at Morton's?

A. Your Honor, it has been so long ago now that I couldn't say for sure if it was the third day or a little later.

Q. That was the third day you were at the property, was it?

A. Yes.

Q. It could have been a weekend day—or there could have been a weekend day or two in between, is that it?

[fol. 67] A. Yes, there could have been, but it has been so long ago I don't rightly remember.

Q. Yes, I understand. How did you happen to go to the France Stone Company property?

A. Well, Mr. Evans took me and my brother Joe out there first and we stood picket out there.

Q. Who is Mr. Evans?

A. That is one of the union officials.

Q. Of what union?

A. The Teamsters Union, Local 20.

Q. Where is the office of that Teamster Local?

A. In Fremont, Ohio.

Q. Who else besides you and Mr. Evans went out to the property of the France Stone Company?

A. Me and my brother Joe and Mr. Evans.

Q. Joe Combs?

A. Yes, sir.

Q. Your brother?

A. Yes, sir.

Q. Did you appear first at the Morton property that day?

A. Yes.

Q. What did Mr. Evans say to you?

A. That morning he told me and my brother that we had to go somewhere and so we got in his car and he drove out to the France's rock quarry, and then out there he put me at one entrance and my brother at the other and we put up signs that Mr. Morton was on strike at both entrances.

Q. This is the day you got the court order?

A. I can't say for sure. I believe it was a day before or right after we got the court order.

Q. Or perhaps right after you got the court order?

A. Yes, sir, it wasn't long after.

Q. Now, you mentioned something about a sign or signs out at France's, did you not?

[fol. 68] A. Yes, sir.

Q. Did you take those signs with you out there?

A. Yes, sir.

Q. More than one sign?

A. Yes, sir, there was.

Q. About how many signs did you take out to France's Stone Quarry that day?

A. There was a stack of signs in the car, but we just used around six of them, I would say.

Q. What did those signs say?

A. That Local 20 of Teamsters Union, to the best of my knowledge, was striking Lester Morton.

Q. Who drove the automobile out there to France's?

A. Well, I followed Larry out there in my car.

Q. You drove your own car out there?

A. Yes, sir.

Q. And Mr. Evans drove a car?

A. Yes.

Q. Was anyone else with Mr. Evans?

A. My brother Joe was with him.

Q. Joe Combs?

A. Yes, sir.

Q. And was anyone with you in your automobile?

A. No, I was by myself. I stayed at a different entrance to the quarry. I was over there by myself.

Q. Can you recall about what time of the day you left the Morton property for the France Stone Company?

A. I guess around ten o'clock in the morning.

Q. How far was the France Stone Company quarry from there?

A. Just guessing, I would say seven or eight miles.

Q. You drove directly there?

A. Yes.

Q. You were following Mr. Evans' automobile, were you?
[fol. 69] A. Yes, sir.

Q. What did you do when you got there?

A. We drove there and when we first got there Mr. Evans took me around to one of the entrances. I parked my car there and put signs on the car, strike signs.

Q. Where was this, at the entrance?

A. Yes, of The France Stone Company.

Q. At the entrance of The France Stone Company?

A. Yes.

Q. What did Mr. Evans tell you?

A. He told me to stand picket there and that I would be relieved that evening.

Q. Did he then leave you or did he stay there with you?

A. He went back with my brother to the other entrance and I think he stayed with my brother for a while, but I don't know how long.

Q. But he did not stay with you?

A. No.

Q. You testified that there are two entrances to The France Stone Quarry in that locality?

A. Yes, for their truckers to go in and out. I think there are only two entrances to use.

Q. What did you do after Mr. Evans left you out there?

A. I got my picket signs out of the car, put one on the back and one on the front.

Q. Of what?

A. My car, and then I had one on the side. I stayed around, hung around there until I was relieved that evening.

Q. You stayed there until evening?

A. Yes, sir.

Q. Where was that? Where did you stay?

A. Right around the car next to the entrance to the quarry.

[fol. 70] Q. Where was your car parked with reference to the entrance to the quarry?

A. It was on the left-hand side of the road there where you enter into the quarry.

Q. How long were you there that day?

A. I would say around six hours.

Q. And you had started that morning at about ten o'clock?

A. It would have been about 10:30 that morning.

Q. Did you eat lunch?

A. I ate sandwiches.

Q. Did you leave the place to eat the sandwiches?

A. No, sir. Mr. Evans brought me the sandwiches.

Q. Did anyone else stand around there with you that day?

A. No. Mr. Evans come around there, but he didn't stay very long with me around there.

Q. When you left did anyone else take over your function there, your job?

A. I left the entrance where I was at and stood around the other entrance and there was another fellow there to take my place when I left.

Q. Did you then go back to the entrance at which you had been standing?

A. Yes. I come back around to the other entrance and got my brother and we went home, back home.

Q. Do you know whether anybody stood where you had been standing picket after you left?

A. I know there was another man sent to stand there.

Q. Who would that have been, if you know?

A. I can't remember exactly, but I believe it was Mr. Nye and Tallbee.

Q. Do you know his first name, Nye's first name?

A. No, I don't.

Q. Who was the other person, Tallbee?

[fol. 71] A. Yes.

Q. Do you know his first name?

A. No, I don't remember it.

Q. Would it be Ransom, R-a-n-s-o-m?

A. Ransom, yes.

Q. Did anyone pass by you as you were standing there at that entrance?

A. Yes. There was trucks going in and out where I was at; practically every once in awhile one would go in or out.

Q. Did you recognize any of the people in any of those cars or trucks?

A. No, sir. I didn't.

Q. Did you speak with any of them?

A. No.

Q. Do you know about what time The France Stone Company employees quit work that day?

A. I don't know for sure, but I believe they quit around five or six o'clock. I couldn't say for sure.

Q. And I believe you testified that you did go to the other entrance before you left that day?

A. Yes, I did.

Q. What did you see there, or who did you see there?

A. Me and my brother and Mr. Evans was there, and our reliefs, the guys that come to stand in our place was there.

Q. So that you saw at the other entrance your brother, Joe Combs?

A. Yes, sir.

Q. Mr. Evans and Mr. Tallbee?

A. Yes.

Q. And Mr. Nye?

A. Yes.

Q. What were they doing there when you arrived?

A. I think they was just by their cars and I think they [fol. 72] was getting instructions on where to go and how long to stay.

Q. Did you see any signs there?

A. Yes, we had signs at that entrance.

Q. Where were they located at that entrance to France's quarry?

A. There was one tacked up on a tree right near the entrance and one or two sticking on a car.

Q. What did those signs say?

A. That Local 20 of the Teamsters Union was on strike at Lester Morton's. I can't say exactly the way it was lettered. It has been so long ago.

Q. Did you return to the France Stone Company quarry again during the course of this strike?

A. No. I never did go back there no more. I just stayed there that one day.

Q. Did Mr. Evans take you any place else during this strike?

A. Yes.

Q. Where did Mr. Evans take you then?

A. We went over to Fremont, where Mr. Morton's trucks was working there. We went to Fremont, me and my brother Joe and Mr. Evans. We went over there.

Q. Is this the same Mr. Evans who took you over to the France Stone Quarry?

A. Yes.

Q. Where did you go at Fremont?

A. I don't recall the name of the contractor or the company that was doing the work.

Q. What kind of work were they doing?

A. It was,—they were blacktopping and concrete, too, but I never worked any over there, so I don't know exactly what kind of work Mr. Morton's trucks was doing over there.

Q. Do you know what kind of work the contractor was doing at that place?

[fol. 73] A. Building a highway.

Q. Do you know which highway it was he was building?

A. It was a bypass for Fremont.

Q. A bypass of the main route there?

A. Yes.

Q. So would you say it was Route 20 in that locality?

A. Yes.

Q. And this general contractor was building this bypass?

A. Yes, sir. We went over there.

Q. Who went with you at that time?

A. Me, my brother Joe and Mr. Evans.

Q. Where did you meet to go out there?

A. At Mr. Morton's.

Q. How did you happen to go along on that trip?

A. Mr. Evans asked us to go with him. He said that he had somewhere to go.

Q. Did he say why he wanted you and your brother to go along with him?

A. Not offhand he didn't, and then we went to Fremont.

Q. Who drove on that trip?

A. Mr. Evans.

Q. What happened when you got there?

A. When we got over there he got out of his car and talked to the man, the boss there, talked to him and asked him not to let any of Mr. Morton's trucks work there.

Q. Where was this man that Mr. Evans talked to on this particular job site?

Mr. Hafer: Objection. I move that the last answer be stricken on the ground that this conversation with a supervisory person is not relevant to prove a 303 violation. In the event the objection is overruled, your Honor, may we have a continuing objection the entire line of questioning.

The Court: What do you claim for this?

Mr. Stauffer: If the Court please, it hasn't been stated [fol. 74] here that this man spoken to by Mr. Evans was supervisory.

Mr. Hafer: He said "boss."

The Court: I caught the word "boss."

Mr. Stauffer: As a matter of fact, I think he was the boss. From that point we contend that we may introduce testimony with respect to state law violations and similar unlawful activity under the state common law under the cases we have cited.

Mr. Hafer: The Court is not without guidance from the defendant on this particular point because we do have a memorandum on file covering the pre-emption issue on damages, and to the extent of the state violations we have a memorandum on file with respect to the question of the legality of inducement of bosses or supervisory personnel. The cases uniformly hold it to be legal under 303.

We are going to waste a lot of time in my judgment if we continue with this line of questioning, which, under the cases, is not competent to prove damages.

Mr. Stauffer: If the Court please, he has taken the approach or position that we have been wasting our time from the outset of this litigation. Nevertheless, it is our position, and that is true in this Circuit particularly, that the Court may consider unlawful conduct, that is, unlawful conduct under state law under the Meadow Creek case.

Mr. Hafer: That was a case of literally hundreds of pickets, mass picketing, dynamiting, guns and other overt physical violence. I conceded that in my opening statement.

Here the witness is asked to testify not with respect to mass picketing, your Honor, but with regard to a conversation between a union officer and a management representative in which the management representative was asked for cooperation to keep certain trucks off the job. [fol. 75] I don't believe that can be represented as coming under the Meadow Creek case. That case dealt with overt violence.

The testimony sought to be elicited at this time is completely outside the factual situation involved in those cases which I cited in my memorandum. Those were violence cases, as I said before, and not applicable here where peaceful conduct is involved.

Mr. Stauffer: But the end result of the actions taken is just as grievous, since the plaintiff was practically ruined as a result of the action taken by the defendants here.

The Court: I am concerned more with the fact that this witness says that Mr. Evans made certain statements to some man out there at a job site. There is no identification of this man to whom he made the statement. It may or may not have a connection.

Mr. Stauffer: We would have to go further into it to establish that, your Honor.

The Court: Do you expect to connect it up?

Mr. Stauffer: Yes, your Honor.

The Court: Then you may proceed.

Mr. Hafer: May we have a continuing objection on the grounds previously stated?

The Court: Yes, you may have that.

Mr. Stauffer: Would you read the last question to the witness?

(Thereupon, the last question was read to the witness, as follows: "Q. Where was this man that Mr. Evans talked to on this particular job site.")

A. He was at a little shack there beside the road where the trucks would pull in and unload, or they would, I would say, pull in there for instructions or if something went wrong with the truck or anything. In other words, it is [fol. 76] just a little shack where a man would stay if he was supervising the job.

Q. Did you take part in that conversation?

A. No, sir, I didn't. I stayed in the car.

Q. You didn't overhear it then, did you?

A. The only thing I overheard is Mr. Evans asked the man about not letting Mr. Morton's trucks go in there, and he said, "I would like to go along with you."

Mr. Hafer: What did you say? That was the response to Mr. Evans' statement?

A. Yes.

By Mr. Stauffer:

Q. Did you overhear anything else in that conversation, Mr. Combs?

A. No, that was just about it.

Q. What happened next?

A. Well, from there we went back to the union Hall.

Q. In what city?

A. Fremont, Ohio.

Q. What did you do there, Mr. Combs?

A. We just sat around for a while and had a cup of coffee and then we went back to Tiffin where I got and picked up my car and went back home.

Q. This was all after you had been at The France Stone Company quarry?

A. Yes; to my recollection; I believe it was a day or two after. It has been so long ago I couldn't say for sure.

Q. But you think it was a day or two after?

A. Yes.

Q. Did Mr. Evans take you any place else during the Morton strike, Mr. Combs?

A. Yes, sir.

Q. Who went along that time?

A. There was me and my brother, James Marcum. I believe that was all then.

[fol. 77] Q. What happened on that occasion?

A. Well, one morning three of Mr. Morton's trucks came out and we followed them out to Maple Grove.

Q. They came out of where, these trucks you mentioned?

A. Out of Mr. Morton's.

Q. Out of his garage property?

A. Yes, from around the parking lot there.

Q. Where were you stationed then?

A. Out front.

Q. Out front of what?

A. In front of Morton's garage, on the picket line there.

Q. How many trucks did you say came out of the Morton premises on that occasion?

A. Three of them.

Q. Now, Mr. Combs, did you recognize the drivers of those three trucks of Mr. Morton's?

A. "Beany". I don't know if that's his real name.

Q. Would that be Vernon Bean?

A. He was one of the drivers.

Q. And who were the other boys, the other two drivers that you saw on that day?

A. I think Howard was one of the others.

Q. Do you mean Howard Stultz?

A. Yes.

Q. And there was one other person, is that correct?

A. Yes, sir.

Q. Who was that?

A. I don't remember his name.

Q. And they were driving Morton's trucks?

A. Yes, with a trailer behind,

Q. Single-axle dump trucks?

A. Yes.

Q. With a dump trailer; is that what you mean, Mr. Combs?

A. Yes.

[fol. 78] Q. Now, were those three trucks loaded or empty when you saw them that day?

A. They were empty as they came out.

Q. About what time of the day was that?

A. I would say around nine o'clock in the morning.

Q. What did you do then?

A. Well, me and James Marcum and my brother and Mr. Evans,—

Q. (Interposing) Joe Combs?

A. Yes, sir.

Q. And the same Mr. Evans was present there, is that it?

A. Yes, sir.

Q. The business agent for Teamsters Local 20?

A. Yes.

Q. What did you do on that occasion?

A. We got into the car and followed them.

Q. Whose car was that?

A. Mr. Evans'.

Q. How did you happen to do that?

A. Well, Mr. Evans asked us to go along, to follow them and to see where they was going.

Q. Where did you follow them to?

A. We followed them out to Maple Grove.

Q. To Maple Grove?

A. Yes, the rock quarry out there.

Q. Where is that?

A. That's about five miles north of Tiffin.

Q. What did you do there?

A. We went out there and went down in the rock quarry, turned around and came back almost to the scale house.

Q. Then what happened?

A. Then the trucks was loaded up.

Q. You saw them being loaded?

A. Yes. They went into the rock quarry. We drove into [fol. 79] the quarry, but we didn't stop there. We turned around and came out and came back up there and waited while the trucks got loaded up for the trip.

Q. What did you do then?

A. We followed them into Toledo.

Q. How many trucks were there leaving the Maple Grove Quarry?

A. Three.

Q. There were still three trucks?

A. Yes.

Q. How many people were in this car you were in at that time, Mr. Combs?

A. There was four of us, counting Mr. Evans.

Q. That would be yourself, Mr. Evans, this Marcum fellow and Joe Combs?

A. Yes, sir.

The Court: The trucks were loaded with stone at the quarry?

A. Yes, sir.

The Court: With No. 8's?

A. I don't remember, sir.

Q. Is that a classification of sand?

A. Yes, sir, I think that's about what they classify it, as sand.

Q. You followed the trucks then?

A. Yes.

Q. And Mr. Evans was driving?

A. Yes.

Q. Was there any conversation in the car about what this was all about, what you were going to do?

A. No. We just followed them to see where they was going and we followed them into Toledo, and offhand I can't recall the name of the company they came to up here.

Q. What kind of a place was it?

[fol: 80] A. It would be an asphalt place, I think, or blacktop mostly.

Q. You mean where they make it?

A. Yes.

Q. Would it have been The Schoen Asphalt Paving Company?

A. Yes.

Q. And you were following the trucks, Morton's three trucks to Toledo?

A. Yes.

Q. And you say that Mr. Evans was driving the car?

A. Yes, sir.

Q. What happened when you got there?

A. Well, we came up and,—

Q. (Interposing) Where did you stop?

A. Right out from the office there.

Q. Did you stop on the Schoen premises, if you know or remember, or did you stop down the street, or where?

A. We stopped right in front of the Schoen place. It would be close to it. I couldn't say for sure because it has been so long.

Q. Then what happened there at that time?

A. Then my brother Joe got out and he had one of the signs.

Q. What did the sign say, if you know?

A. It said that Morton and Teamsters Local 20 were on strike.

Q. Did you get out of the automobile?

A. I didn't get out. Mr. Evans talked to somebody, but I didn't hear the conversation.

Q. Then what happened, do you remember?

A. The trucks didn't get unloaded.

Q. How do you know that?

A. Well, Mr. Morton brought his drivers back and we [fol. 81] followed them almost back into Tiffin. They left the trucks there.

Q. Mr. Morton also drove to Schoen Paving Company in Toledo?

A. He was there a little while later, but I didn't see him when we pulled up. I couldn't say if he got there just before or after we got there.

Q. But you saw that the drivers left?

A. Yes.

Q. Did they leave in their trucks?

A. No.

Q. How did they leave?

A. In a car.

Q. Who was driving that car, if you recall?

A. It has been so long ago that I couldn't say for sure.

Q. Do you recall whose car it was or who was in it?

A. Well, I know Beany and Howard was there.

Q. Howard Stultz and Vernon Bean?

A. Yes.

Q. Two of the three truck drivers?

A. Yes.

Q. Was anybody else in that car? Was the third truck driver in that car?

A. Yes, I think he was in it, and Mr. Morton.

Q. Mr. Morton was in that car?

A. Yes, sir. To the best of my knowledge, those were the four in the car.

Q. What did you do while you were there at the gate of Schoen Asphalt Paving Company?

A. Well, my brother, he got out with a picket sign, but I didn't get out of the car. I stayed in the car. I opened the door once and got almost out and stood by the car a little while and then got back in the car. I didn't go away from the car.

[fol. 82] Q. What did you see your brother Joe do?

A. He got a picket sign out when he got out of the car with him; I think him and James, both.

Q. James Maroum?

A. Yes.

Q. They each got a sign?

A. Yes.

Q. What did they do with them?

A. They walked up to the gate entrance to the place and was there with the signs, just the same as walking picket.

Q. Did you see those signs?

A. Yes.

Q. What did they say, these signs?

A. That Local 20 Teamsters were on strike against Lester Morton's. To the best of my knowledge that is what they said.

Q. About how long were you there?

A. Right offhand I guess about an hour. I couldn't say for sure. It has been so long ago.

Q. You left after the three truck drivers and Mr. Morton left, is that it?

A. Right after they left, yes.

Q. When you left did you see those three trucks, before you left and after the drivers had left?

A. After they left?

Q. Yes.

A. Yes.

Q. Were those trucks then loaded or unloaded?

A. Loaded.

Q. The trucks were still loaded when you left?

A. Yes.

Q. Do you know of your own knowledge what happened to those trucks later?

[fol. 83] A. No. -I couldn't say offhand what exactly happened.

Mr. Stauffer: You may inquire.

Cross examination.

By Mr. Hafer:

Q. Mr. Coimbs, prior to the strike in August of 1956 how many union meetings did you attend in connection with the question of getting a contract from Mr. Morton?

A. Why, just that one.

Q. At which a strike vote was taken?

A. Yes. We was over there about a week and then we went back, and that is when we voted on the strike.

Q. Then there were two meetings that you attended?

A. Yes, I attended two meetings.

Q. What was the purpose of the first meeting?

A. I think that was to bring up the subject of the strike, but I didn't stay around very long that night. I didn't pay much attention to the meeting.

By Mr. Hafer:

Q. You have testified that you were personally present at Morton's premises on the first day of the strike, is that true?

A. Yes, I was.

Q. And you stayed there until about three o'clock or so in the afternoon?

A. Yes.

Q. Except for the occasions that you went some place else with Mr. Evans or another business agent, Mr. Combs, were you on the picket line every day during the strike?

A. No, not every day I wasn't.

Q. How many days during the strike were you absent from the picket line, if you can tell us that?

A. Putting them all together that I was absent?

[fol. 84] Q. Yes.

A. We were out about fifty days and I would say I was absent about 21 or 22 days.

Q. So that you were there more than fifty per cent of the time, so far as the number of strike days are concerned, on the picket line, is that true?

A. About fifty per cent yes, I would say I was.

Q. On the first day of the strike you testified, I believe, that there may have been about 25 men in the area, is that correct?

A. That's right.

Q. We have as a part of the record in this case aerial photograph, Mr. Combs, of the general area around the premises of the Morton Trucking Company. I want you to tell us—and while looking at the photograph I want you to be a little more specific as to whether the men who were there on the first day of the strike were on both sides of the road; that is, some around the so-called root beer stand and also some across the street from Mr. Morton's premises.

A. We were parked in through here (indicating on photograph). There is a little sand over there and there is the highway, and he was over there to get something to eat and drink. There is the little ravine (indicating on photograph).

Q. So that the record is clear on it, when you say you were over by the little ravine area, Mr. Combs, you are indicating an area between the road and Mr. Morton's premises, an area located to the right of the driveway appearing on the right side of the photograph, is that correct?

A. Yes. This is where we was parked, right through here (indicating on photograph).

Q. Will you also show that to the Judge?

A. We was parked in there, and a lot of times we would [fol. 85] come out through here. We would come in the other way and drive through here and park (indicating on photograph).

Q. On the first day of the strike you have told us where your cars were parked. Was it customary throughout the strike to park your cars in that general vicinity which you used on the first day of the strike?

A. Lots of the time we did.

Q. In addition to that, Mr. Combs, some of the cars were parked across the street from Mr. Morton's premises in the parking area around the root beer stand?

A. Sometimes some of them would park over there, but we wasn't allowed to park over there permanently.

Q. On the first day of the strike were any of the cars parked in the driveway areas leading in and out of Mr. Morton's premises?

A. Not in the driveways, no.

Q. At any time did you observe any of the cars parked across the driveways entering into Mr. Morton's premises; that is, a car permanently left there in the driveway?

A. No.

Q. Were the men who appeared at the scene of the picket line on the first day of the strike milling around in the area of their cars, standing around in groups and talking among themselves and things like that?

A. Yes.

Q. Were they standing in groups in the driveway areas?

A. No, not in the driveways.

Q. As a matter of fact, at no time during that first day of the strike were the driveways physically blocked, either by the men themselves or by their automobiles, were they?

A. No, they wasn't blocked.

Q. You said that on the first day of the strike a few [fol. 86] trucks came out of Morton's premises during the time you were picketing. At any time did you observe the driveways being physically blocked by cars or men?

A. No.

Q. Before the court order was given to you or called to your attention, Mr. Combs, how many men were actually in

possession of picket signs and walking with those signs in their possession, do you recall that?

A. Well, all of us didn't walk at the same time with them, but there would be about four or five men, I would say, with paper signs and we had some drove in by the drive-ways.

Q. You mean propped against the entrance and stuck in front of the cars, don't you?

A. Yes, and drove in the ground.

Q. And stuck in the ground?

A. Yes, across from where we was parked and in front of the gas pumps there.

Q. And the men actually carrying signs walked in the area beside the driveways; did they not?

A. I could probably show you a little better than I could explain it. We was walking through here and we had a sign stuck in here (indicating on photograph).

Q. You are indicating a telephone pole, are you not?

A. Opposite the gas pump there, and we had signs here. We had one drove up there, and down here we walked with picket signs (indicating on photograph).

Q. You mean in the area you previously identified where cars were parked?

A. Yes.

Q. With reference to the telephone pole, Mr. Combs, do you mean the telephone pole adjacent to roughly the middle of the main building shown in this photograph?

A. That's right.

[fol. 87] Q. At any time did the pickets there conduct themselves in such manner as to physically prevent any vehicles or persons from entering or leaving the premises?

A. No.

Q. After the court order was there a reduction in the number of men actually carrying signs in the area?

A. Yes, there was a reduction.

Q. How much of a reduction, Mr. Combs?

A. There was supposed to be four of us at a time there on picket that was allowed.

Q. The only difference before and after the court order was the reduction of one or two in the number of people carrying signs, is that correct?

A. Could you repeat that?

Q. The only difference then in the manner of picketing before and after the state court order was the fact that after you got the court order you reduced the number of pickets from six to four, is that correct?

A. Before we got the order there was a lot of men there all the time. After we got the order then several of us, only four of us, was supposed to be on picket at a time.

Q. Well, the other men before the court order was issued were congregated, you said, around the parked cars?

A. Yes.

Q. Now, after the court order was issued did those groupings of men around the parked cars cease?

A. Yes. The only time there would be over that was about once a week there would be a bunch over there.

Q. After the order was issued did the drivers who were not actually on picket duty stay away from the area altogether?

[fol. 88] A. I wouldn't say altogether, because I come back there lots of times when I wouldn't be on duty and I would stop and talk with them for a while.

Q. You have testified on direct examination concerning some activities at the France Stone Company. You told us that you went to that stone company with Mr. Evans and your brother Joe; do you recall that?

A. Yes, sir.

Q. And you testified that you personally and your brother Joe as well were engaged in carrying signs at the France Stone Company premises, is that right?

A. That's right.

Q. Now, were trucks going in and out of the France Stone Company premises on the day that you were there?

A. There was a lot of trucks went in and out of there.

Q. Whose trucks did you see there?

A. Some of Mr. Morton's trucks was there.

Q. How long after the strike began was it that you went out to France Stone Company, over a week?

A. It might have been about a week. I couldn't say for sure. It has been so long ago.

Q. In any event, at about the time you were there at the France Stone Company's premises Mr. Morton had some of his drivers driving company equipment?

A. Yes, there was some drivers still working.

Q. Did any of those drivers turn away, refuse to go into the premises of France Stone Company when you were there with your picket sign?

A. That day?

Q. Yes.

A. No.

Q. Were there any that refused to come out, that is, left their trucks and equipment at the France Quarry when you were picketing there, Mr. Combs?

[fol. 89] A. Not at the entrance I was at.

Q. Were there any companies that you recall whose trucks entered or left the premises on the day that you were at the France Stone Company premises with the picket signs?

A. There was a truck stopped there that day. The tractor-trailer was stopped. Mr. Evans asked him for his union card, and that is the only one I recall stopped there.

Q. Which company was that truck from?

A. I don't recall. He was coming out of the quarry then.

Q. Across the picket line?

A. Yes.

Q. And he went on about his business?

A. Yes.

Q. To your knowledge, Mr. Combs, did any truck of any company refuse to enter the France Stone premises on the day that you were picketing?

A. Not at the entrance where I was at.

Q. And there was another entrance, was there not?

A. Yes.

Q. Were the employees working at the stone quarry already on the job on the day you were at the France Stone Company picketing?

A. Yes, there was.

Q. Approximately how far were you located from the area in which the quarry employees were performing their work?

A. I would guess about as close to—just guessing—

Q. (Interposing) One mile would you say?

A. That's just a rough guess. I'd say it wasn't hardly a mile, but I couldn't hardly say.

Q. Could you from the position you were in observe the men, actually see the men at the quarry doing their work? [fol. 90] A. No.

Q. Were there any hills or buildings which obstructed any possible observation on your part of the actual quarry operation, Mr. Combs?

A. From where I was parked there was a little rise in grade up into the quarry. I couldn't see the men at work, no.

Q. Because of a rise in the general terrain of the area?

A. Yes, and because of the way the gravel is stacked in the quarry, sir.

Q. Was there a stockpile of gravel between you and the men in the quarry?

A. Not straight from the road there wasn't.

Q. In any event, you couldn't see the men working in the quarry itself, is that right?

A. No, sir, I couldn't.

Q. Did you ever see any of the men at the quarry performing their work on the day you were picketing?

A. Yes, at the scale house where they weigh the gravel.

Q. When you were at the scale house that morning who were you with?

A. Mr. Evans.

Q. Did you get out of the car?

A. No.

Q. Did you talk to any of the employees of the quarry?

A. No.

Q. At any time during that day did you talk to any of the employees of the quarry?

A. No, I didn't.

Q. To your knowledge did any of the workers at the quarry quit work while you were picketing?

A. To my knowledge, no.

Q. Did you return to the quarry the second day, Mr. Combs, or on a second day?

[fol. 91] A. No; just one day is all I stayed there.

Q. You also testified on direct examination with respect to a trip to Fremont and a conversation between Mr. Evans and a boss on a blacktopping job. Do you know the name of the man Mr. Evans talked to there?

A. No, I don't.

Q. How far was the car parked from the supervisor's shack on the job site that day?

A. Around 75-foot.

Q. Did you walk over to the shack with Mr. Evans?

A. No. I didn't get out of the car.

Q. Where did Mr. Evans have his conversation with the man you referred to as the boss?

A. Between the car and the shack where he had stayed.

Q. So that they were outside the shack when this conversation occurred?

A. Yes.

Q. You overheard only two statements, is that correct, of this conversation?

A. Yes.

Q. One was a statement by Mr. Evans that he would like to have his cooperation in keeping the Morton trucks off the job?

A. Yes.

Q. And the reply of the man saying, "I would love to help you," or words to that effect, is that correct?

A. Yes.

Q. How long a period of time was Mr. Evans and the man we are calling the "boss" engaged in this conversation?

A. I would say a minute or two. It was just a short conversation.

Q. Did any of the men who were with you on the day that you went to Fremont talk about the blacktop job, or did any of the men get out of the car and carry signs at the premises of this job?

[fol. 92] A. No, not there they didn't.

Q. To your knowledge, Mr. Combs, did any one of the people in the car with Mr. Evans have any conversations

with anybody on that job except for Mr. Evans' conversation with the boss?

A. No.

Q. You testified towards the end of your direct examination about going to Maple Grove and to the rock quarry there; do you remember that?

A. Yes.

Q. About how long after the strike started did this event occur?

A. It has been so long I couldn't say for sure.

Q. In any event, at the time you went there Mr. Morton had truckdrivers who were crossing the picket lines at his premises and were still working for him?

A. Yes.

Q. And you followed three trucks to the Maple Grove Rock Quarry, is that correct?

A. That's right.

Q. At the quarry did you or any of the other people accompanying you get out of this car?

A. Mr. Evans got out.

Q. At the quarry?

A. Yes, at the scale house.

Q. Do you know who he talked to there?

A. No, sir, I don't.

Q. He went into the scale house?

A. Yes.

Q. In addition to Mr. Evans there was yourself and your brother Joe and a man by the name of James Marcum?

A. Yes.

Q. Did either your brother Joe Combs or Mr. Marcum get out of the car at the quarry?

[fol. 93] A. No.

Q. Did you overhear any part of Mr. Evans' conversation, if he had one there?

A. No, I didn't.

Q. Did you personally see who Mr. Evans was talking to, if there was anyone?

A. Not personally I didn't, no.

Q. After the trucks were loaded at the quarry they then proceeded to the premises of Schoen Asphalt Paving Company in Toledo?

A. Yes.

Q. That is here in Toledo, you said?

A. Yes.

Q. Did the trucks arrive at Schoen's premises before you and the other people in your car arrived there?

A. Yes.

Q. The trucks were already inside the premises of Schoen when you pulled up in front of Schoen's?

A. It has been so long I couldn't say exactly; just before they did or after they pulled in, but I do know when we got there my brother Joe and Marcum got out with strike signs, and I heard some man say,—

Q. (Interposing) In any event, you arrived almost at exactly the same time the trucks arrived at Schoen's place of business, or a minute or two before or after, is that right?

A. To my recollection, I couldn't say for sure. I wouldn't want to say for sure, but I do know the trucks did get there and Mr. Evans,—

Q. (Interposing) Just a minute.

Mr. Stauffer: Let him finish.

Mr. Hafer: I will be the judge of that. The answer is not responsive to the question, and this is cross-examination, of course.

By Mr. Hafer:

Q. What I want to do is take it in a very simple step [fol. 94] by step way, Mr. Combs. Try as best you can to answer the question, only the question I am asking you.

At the time you pulled up at Schoen's place of business where was the car parked in relationship to the driveway entrance to Schoen's premises?

A. Over to the left-hand side by the curb. It was the left-hand side of the entrance. To my knowledge, that is where we was parked.

Q. Was the car blocking the entrance to Schoen's?

A. No.

Q. As soon as the car was parked I believe you testified that your brother Joe at least got out of the car, and

perhaps Mr. Marcum, too, and started to walk with the picket signs, is that right?

A. Yes.

Q. At the time they started to walk with the picket signs did Mr. Evans then at this point proceed to walk into the office of Schoen?

A. Yes, he went in there.

Q. He started to walk in there at about the same time your brother Joe and Mr. Marcum started to picket, is that true?

A. I would say it was about the same time.

Q. While Mr. Evans was inside the office your brother Joe and Marcum continued to picket?

A. Yes; they was out front.

Q. During the time the picketing was going on the trucks of Mr. Morton were inside there, on the premises of Schoen Asphalt Paving Company, were they not?

A. Yes.

Q. You could see them from where you were, could you not?

A. No, I didn't pay much attention to that. I was sitting in the car.

[fol. 95] Q. About how far was the entrance to the premises of Schoen to the office that Mr. Evans entered?

A. From where the car was parked?

Q. Yes.

A. Offhand, sir, I couldn't say for sure.

Q. A hundred feet or more?

A. Something like that.

Q. Did any trucks enter onto the premises of Schoen Asphalt Paving Company during the time that you were present on this day we are talking about?

A. I didn't pay much attention to that. I would say a truck or two entered, but I didn't pay much attention. I couldn't say for sure.

Q. To your knowledge, did any truck respect the picket line and not go into the Schoen premises while this picketing was going on there?

A. Not while I was sitting there.

Q. As soon as you left with Mr. Evans, Joe and Marcum left, too, did they not?

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A. That's right.

Q. Did you observe any of the employees of Schoen Asphalt quitting work while the picketing was going on?

A. No.

Q. After about an hour you testified Mr. Evans came out of the Schoen office and got into the car, is that right?

A. That's right.

Q. And thereafter he told Joe, your brother, and Mr. Marcum to come with him and the picketing was ended at that point, is that right?

A. Yes, and that the trucks would not be dumped.

Q. And the trucks were still on the premises of Schoen and had not been unloaded at that point?

A. That's right.

Q. You have testified here today, I believe, with respect to two places at which men with signs were walking other [fol. 96] than the premises of Morton. You testified that one of them was the France Quarry. You testified, too, with respect to Schoen. You have told us all about those.

My question to you now is whether you personally observed any picketing at any company other than Morton's except for the two you have told us about?

A. Except for the two I was on?

Q. Yes.

A. No, not personally.

Redirect examination.

By Mr. Stauffer:

Q. Mr. Combs, you have testified that prior to the issuance of the Court order you observed picketing by 25 or more men?

A. Yes.

Q. At Morton's premises?

A. Yes.

Q. How much was that reduced after the court order?

A. After the court order how many was on?

Q. How many fewer were on after that court order than there were before, yes.

A. There was supposed to be just the four of us.

By Mr. Stauffer:

Q. To proceed; Mr. Combs, you testified for the first time on cross-examination that when you were standing at The France Stone Quarry gate or entrance you observed Mr. Evans stop a truck that was coming out of the quarry, and you testified that Mr. Evans talked to that truckdriver?

A. Yes.

Q. Do you know who that truckdriver was?

[fol. 97] A. No, I don't.

Q. Did you hear what Mr. Evans said to that truckdriver?

A. Mr. Evans told him he was a union official and Mr. Morton's drivers was on strike, and he asked him to show Mr. Evans his card, what union he belonged to, if he belonged to the union, and the man showed it to him and Mr. Evans let him go on.

Q. Did you and Mr. Evans discuss that incident then?

A. No, we didn't. I didn't pay any attention to it.

Q. When you were testifying on cross-examination in answer to a question put to you by Mr. Hafer you started to say something about the things you did at the Schoen Asphalt Paving Company premises, and you said you knew something because you saw Mr. Evans do something or go somewhere.

Can you tell us about that now?

A. When we stopped at Schoen's?

Q. Yes.

A. Well, Mr. Evans,—about the only thing that was said, to my recollection, was he said, "If we need any help we can get it." I don't know what he meant by it.

Q. Who was she talking to?

A. He was talking to the three of us.

The Court: To whom?

A. My brother Joe, myself and James Marcum.

Q. But you don't know what he meant by that?

A. No, sir, I don't.

Mr. Stauffer: That's all, your Honor.

Recross examination.

By Mr. Hafer:

Q. Mr. Combs, where did the conversation with Mr. Evans when he said "We can get some help if we need it"?

[fol. 98] A. At the car.

Q. At the car?

A. Yes.

Q. Was that before or after Mr. Evans went into the office of Schoen Asphalt?

A. Before.

Q. Was anyone present at the time of this particular conversation other than yourself, your brother and James Marcum, and of course Mr. Evans?

A. No.

Q. Was your brother Joe and Mr. Marcum, were they truck drivers for Mr. Morton at this time?

A. Yes.

Q. And they were participating in the strike?

A. Yes.

Q. Are you sure, Mr. Combs, that when you went to Schoen Asphalt Paving that it was Mr. Evans who was with you? Couldn't it have been Mr. Reagan, another representative of the union?

A. No.

Q. You are confident that it was Mr. Evans?

A. I am almost positive.

Thereupon, the Plaintiff called as a witness, Mr. HUBERT OLDS, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Hubert Olds, O-I-d-s.

Q. Where do you live?

A. Bloomville, Ohio.

[fol. 99] Q. How long have you lived there?

A. I have lived there for thirty years.

Q. Where do you work, Mr. Olds?

A. For The France Company at Bloomville.

Q. How long have you worked there?

A. Over thirty years.

Q. What do you do there?

A. Well, I am listed on the payroll as a mechanic.

Q. What did you do there in 1956?

A. Mechanical work.

Q. Where do you work, on the grounds? Do you work in a garage or where?

A. I work around any place they need me; in the plant in the pit or in the building there.

Q. As a mechanic what kind of machinery do you work on?

A. Stone-crushing machinery and trucks.

Q. And the machinery that loads the trucks that come into the quarry, is that true?

A. Sometimes, and sometimes I run a locomotive that hauls the stone.

Q. Do you belong to any union?

A. I do.

Q. Did you belong to a union throughout 1956?

A. I did.

Q. What union did you belong to in 1956?

A. The International Union of Operating Engineers.

Q. Do you still belong to that union?

A. Yes.

Q. Are you anything other than a member of that union?
Are you an officer, of that union?

A. I am a committee member or steward.

Q. Were you such in 1956?

A. Yes, I was.

Q. And in the summer of 1956, in particular?
[fol. 100] A. I was.

Q. What are your duties as a committeeman or steward,
Mr. Olds?

A. To receive the grievances of the men, if they have
any, and to carry them to the superiors.

Q. How long have you been a committeeman or steward?

A. Over twenty years.

Q. Are there any other committeemen or stewards at
The France Stone Company, Bloomville Plant?

A. Yes, there are.

Q. How many others are there?

A. One other man.

Q. That was the situation, was it, in the summer of 1956?

A. I can't answer that. I don't know that because some-
times they do not have two or three; we may have had one.

Q. In the summer of 1956, at any rate, you were a union
steward there at that time?

A. Yes; there could have been at that time, yes.

Q. All right. Approximately how many employees of
The France Stone Company were members of your union
in the summer of 1956?

A. There were possibly between 20 and 25.

Q. What kind of business does The France Stone Com-
pany have there, Mr. Olds?

A. Building stone and stone for road construction.

Q. It is a stone pit and gravel pit?

A. A stone pit, a limestone pit.

Q. Have you ever heard of The Lester Morton Trucking
Company of Tiffin, Ohio?

A. I have.

Q. Did Morton's trucks ever come into The France Stone
Company's pit prior to the summer of 1956?

A. They have.

[fol. 101] Q. For how many years, if you know?

A. Over thirty years.

Q. Did you learn of any labor difficulty that Mr. Morton was having in the summer of 1956?

A. I did.

Q. How did you learn of that?

A. Through a representative of a union.

Q. Through a representative of what union, if you know?

A. The Teamsters.

Q. Do you know what Teamsters Local or what area it was?

A. I couldn't tell you. They told me at the time, but now I don't remember.

Q. Was this a conversation between you and some other person?

A. It was.

Q. Where did that take place?

A. Down at the stone quarry, at the plant.

Q. You were working at the time?

A. I was.

Q. And this was on the France Stone Company property?

A. It was.

Q. Was it inside a building or outside?

A. It was outside.

Q. Who was present besides yourself and this other person you spoke to, if you know?

A. I believe that the superintendent was there, my boss. I don't remember for certain.

Q. Whether or not he was there, Mr. Olds, what is his name?

A. C. C. Robison.

Q. Do you recall about what time of the day that conversation took place?

[fol. 102] A. It was in the forenoon, but I won't say for certain the exact time.

Q. Had you known about the difficulty Morton was having prior to that conversation?

A. I was informed by the superintendent that there would be a man there to talk to me.

Q. You were so informed that same day?

A. Yes.

Q. Had you known about the strike before that day?

A. I had not.

Q. What was the substance of your conversation with this man that came to talk to you?

Mr. Hafer: We object to any testimony with respect to the substance of that conversation. The International Teamsters Union has over 900 locals; it has four or five geographical divisions, and multiple state divisions. There is nothing in the record to show what Teamsters Local or Council or Division the man who represented himself to be a Teamster official represented. Until there has been some identification, your Honor, we cannot be bound by any testimony relating to conversations he may have had.

The Court: There ought to be some further identification of the man he talked to.

By Mr. Stauffer:

Q. Is not the man you spoke to sitting in the courtroom, Mr. Olds?

A. I cannot say. I do not remember the man. It was in 1956 and I don't remember.

By Mr. Stauffer:

Q. How did this man that came to you identify himself? Who did he say he was?

A. The way I understood him is that he was representing the Teamster Union.

[fol. 103] Q. Did he say what Teamster Union or anything of that nature?

A. I do not know the man.

By Mr. Stauffer:

Q. Did he say what he was doing there?

A. He told me he was there to,—saying not to load Mr. Morton's trucks.

The Court: * * * Just state what was said, what did he say, and how did he introduce himself?

A. I understood—now I remember, but it has been long ago,—I understood him to say that he was from the Teamsters. He may have said the number. I don't know; I don't remember, and that they wanted us to quit loading Mr. Morton's trucks. Now, that was the substance of his conversation to me.

The Court: You don't know anything more about the identity of the man?

A. I do not know his name and I can't remember that.

The Court: The answer may be stricken.

Q. Mr. Olds, how many entrances are there to The France Stone Company's quarry?

A. Two.

Q. Are they off different roads or off the same road?

A. No, they are off different roads.

Q. Do you use the same entrance each day or might you use different ones?

A. Personally?

Q. Yes.

A. I use the same one.

Q. Please identify the one you use. How would you identify it?

[fol. 104] A. Going into the plant from the south.

Q. What road is that off of?

A. The New Haven Road. It is a county road.

Q. Now, on the day you have been testifying about, Mr. Olds, did you see anything unusual at the entrance to the stone quarry?

A. Not when I went to work.

Q. Did you see anything when you left?

A. No.

Q. Or on the day preceding or the day following?

A. No.

Q. Did you discuss this difficulty of Morton's with any one else?

A. No.

Cross examination.

By Mr. Hafer:

Q. Do you recall missing any time from work during August of 1956 from the France Stone Company quarry?

A. Sir?

Q. Did you miss any time from work during August of 1956?

A. No, I didn't.

Q. As far as you can remember you were working every day you were supposed to be working?

A. Yes, sir.

Q. At any time during the month of August, 1956, was there any strike or stoppage of work by the employees of France Stone that you observed?

A. No.

Q. As far as you know, Mr. Olds, there weren't any strikes or work stoppages at France Stone Company in August, 1956?

A. No.

Q. The answer is that there were none, is that true?
[fol. 105] A. There was none that I know of, if I interpret your question right.

Q. You know what a strike is, everybody quits work and they do not work?

A. We didn't do that.

Q. Were there any slowdowns during the month of August, 1956?

A. It was asked for, a slowdown.

Mr. Hafer: We move that the answer be stricken.

It is not responsive.

The Court: What is the purpose of this cross-examination?

Mr. Hafer: I want to show that they continued to work as usual during this period of time.

By Mr. Hafer:

Q. At any time during the time you were working there in August and September of 1956, Mr. Olds, did you personally refuse to enter through either of the two entrances to The France Stone Company premises?

A. I don't understand the question.

Q. Did you go to work every day that you were supposed to?

A. I did.

Thereupon, the Plaintiff called as a witness, Mr. BERNARD BEAN, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Bernard Bean.

[fol. 106] Q. What is your address, Mr. Bean?

A. Route 4, Box #29, Tiffin, Ohio.

Q. For whom do you presently work?

A. Lester Morton Trucking Company.

Q. Did you work for Morton in 1956?

A. Yes, sir.

Q. What was your job in 1956?

A. I was truckdriver, driving trucks for him.

Q. Did you participate in the strike in August, 1956?

A. No, sir.

Q. When did the strike take place in 1956, what month in 1956? When did it start, Mr. Bean?

A. That I couldn't offhand say, honest I couldn't.

Q. Was it in the summer?

A. In the summer or in the spring of the year.

Q. What was your last answer?

A. In the spring of the year or just at the beginning of summer.

Q. Do you recall the first day of the strike?

A. Yes.

Q. Did you work the first day of the strike?

A. Yes, sir.

Q. Did you drive a truck the first day of the strike?

A. No, sir.

Q. What did you do?

A. I worked in the garage.

Q. Did you drive a truck at all during the strike?

A. Yes, sir.

Q. About how many days after the first day of the strike did you first start to drive a truck?

A. Well, it was quite a few days after the strike started; I couldn't just say.

Q. About a week or so?

A. Yes. There was at least a week or more; I am sure it was.

[fol. 107] Q. Do you recall what you did when you drove a truck for Lester Morton during the strike?

A. Yes, sir, I do.

Q. What did you do?

A. I took a truck and took a load of sand to Schoen Asphalt Paving Company. I drove to Dolomite, Inc., and then I went to Toledo.

Q. Did anyone else work the same day you worked for Morton?

A. When I loaded the truck?

Q. Yes.

A. Howard Stulz and Clifford Smith.

Q. Did the three of you work in a group?

A. Yes. We took three trucks that day, three doubles and,—

Q. (Interposing) A "double" is what?

A. A tractor-dump truck with a tandem hook on the back of it.

Q. And a tandem is a dump trailer?

A. That's right.

Q. Where did you go that day?

A. We went to Dolomite, Inc.

Q. The three of you in three trucks?

A. That's right.

Q. Where is that company located?

A. It is north of Tiffin about eight miles.

Q. What is Dolomite, Inc.?

A. It is a big Maple Grove dolomite quarry.

Q. What did you do there?

A. We loaded sand.

Q. Then what did you do?

A. We weighed out and we went to Toledo to The Schoen Asphalt Paving Company.

Q. Were you followed on the way here?

A. Yes, sir.

[fol. 108] Q. Do you know by whom?

A. Yes, sir.

Q. How do you know who it was?

A. I know the man that followed me is Mr. Larry Evans.

Q. Did you see him?

A. Yes, sir.

Q. Was he in an automobile or what?

A. Yes, sir; he was driving.

Q. Was he alone or with anyone?

A. No, sir.

Q. He was not alone?

A. No, sir.

Q. Who was with him?

A. I think it was either one or the two Combs boys with him, but anyway there was two different cars.

Q. What are the first names of the Combs boys?

A. One was Joe and the other one was John.

Q. When did you first see Mr. Evans and the others?

A. At the Dolomite, Inc., Bettsville Quarry.

Q. When did you see them again?

A. When we pulled out across the railroad track headed for Toledo here.

Q. The railroad tracks at the quarry?

A. At the entrance.

Q. Did you see them that day again?

A. Yes, sir. Many times they went around us, parked

in driveways and waited until we passed and then they would follow us and then go around us again.

Q. Was this on your way to Toledo?

A. Yes.

Q. And just on that one trip?

A. That's right.

Q. When you arrived here in Toledo what did you observe?

[fol. 109] A. At Schoen's?

Q. Yes.

A. Well, they pulled in a few seconds back of us.

Q. Who is "they"?

A. Mr. Evans and the other people with him. They pulled in in back of us and they never drove the cars in the yard. We drove in the trucks there.

Q. Did you observe them stop near the Schoen property?

A. They stopped on the outside of the property.

Q. They parked there?

A. Yes, sir.

Q. Did you observe who was in the second car?

A. No, I couldn't.

Q. Three of you men in trucks arrived at about the same time, is that right?

A. All three of us was in a convoy, yes.

Q. What did you do when you got there?

A. We pulled in the gate.

Q. What did you do next?

A. We went to see about unloading, and Mr. Evans went in the office and one of Schoen's men came out, and then I think it was the superintendent came out and told us that we couldn't unload.

Q. Did you personally go into the office?

A. I didn't myself, no, sir.

Q. What did you do then?

A. We sit there in the trucks. Mr. Morton told us we couldn't unload.

Q. When did he tell you that?

A. He was right with us, or back of us.

Q. Was he with you at the quarry at Maple Grove?

A. Yes, he was.

Q. So that you were in a convoy consisting of three trucks and Mr. Morton?

A. Yes, sir. He was driving his own car.

Q. Did he arrive at Schoen's before you did?
[fol. 110] A. Right behind us.

Q. Did you have any discussions at Schoen's property with anyone other than Mr. Morton?

A. No, just when he come out of the office and told us we couldn't unload.

Q. Did you unload your truck then?

A. No.

Q. Did any one of the three trucks unload that day at Schoen Asphalt Paving Company?

A. No, sir.

Q. How long did you stay at the Schoen premises?

A. I don't know exactly. I would say not over a half-hour at the most.

Q. Did you leave in your trucks?

A. No, sir.

Q. How did you leave?

A. We left with Mr. Lester Morton in his car.

Q. You left with Mr. Morton in his car?

A. Yes, sir.

Q. Had your trucks been unloaded yet?

A. No, sir.

Q. Where did you park your trucks with respect to the gate that you came in?

A. Well, I would say it was right south of the gate and back of the office.

Q. Inside the Schoen property?

A. Yes; inside the gate, inside Schoen's property.

Q. Did you observe the gate while you were there at the Schoen property?

A. Yes, sir.

Q. Could you see it from your truck, or did you get out of your truck?

A. We got out of the trucks after we parked them and walked back to the gate and got in the car with Mr. Morton.

[fol. 111] Q. What did you observe at the gate while you were there?

A. Well, I saw picket signs up on the outside. I don't

recall if they was carried by anybody or whether they was sitting up against the fence there.

Q. How many signs did you see there, do you remember?

A. I would say there was two; one on the right and one on the left.

Q. Do you recall what those signs said?

A. "Lester Morton on Strike."

Q. Do you recall whether the signs had the name of any union on them?

By Mr. Stauffer:

Q. Do you recall whether those strike signs had the name of any union inscribed on them?

A. Yes, Local 20.

Q. Were those signs there at the Schoen Asphalt Paving Company premises when you left?

A. Yes, sir, they was.

Q. Do you recognize any of the persons carrying those signs?

A. I don't recall if they was carrying them. I saw them up against the fence there. All I recall seeing is the man I knew in the Oldsmobile.

Q. Who was that?

A. Mr. Larry Evans was one of them, and there was Mr. John Combs or Joe Combs. I don't recall which one it was.

Q. During the strike did you work on the construction of the Route 20 bypass at Fremont?

A. I did for one morning for about an hour and a half or two hours, yes.

Q. How many days after the Morton Strike began was that, Mr. Bean, do you remember?

A. That I really couldn't say, just how long after it was: [fol. 112] Q. Do you know whether or not a court order was issued during the course of this strike?

A. It was.

Q. Do you know whether or not you worked at the Fremont bypass job after that court order was issued?

A. Never.

Q. So that you worked at the Fremont bypass job before the court order was issued?

A. I was working there before the court order, yes, sir, and before the strike was ever there.

Q. Did you work at the Fremont bypass job at all during the course of the strike?

A. Just about an hour and a half or two hours one morning.

Q. I want to ask you about that particular day. Was that day before or after the court order?

A. After the court order.

Q. It was after the court order?

A. After the court order.

Q. Did anyone else who was also an employee of Morton work at all that same day?

A. Yes, sir.

Q. Who was that?

A. There was my brother, Hilliard Bean.

Q. Was there anyone else from Morton's working that day?

A. I can't recall the names because it was so long ago.

Q. How did you happen to go over there that day?

A. They called us.

Q. Who called you?

A. Launder & Son Construction Company.

By Mr. Stauffer:

Q. Mr. Bean, did anyone instruct you to go over there?
[fol. 113] A. Yes.

Q. Who was that?

A. Lester Morton.

Q. Did you drive a truck?

A. I didn't myself, no.

Q. You did not?

A. No, sir.

Q. What did you expect to do there that day?

A. I went over to batch.

Q. Do you do that with a truck?

A. No, sir. I am foreman in charge of trucks. I drove a pickup truck over.

Q. Did any of Mr. Morton's trucks go over there that day?

A. Yes. As I usually do on the job, I led the trucks to the job out there.

Q. With a pickup truck?

A. Yes.

Q. And several dump trucks followed you?

A. That's right.

Q. What did you do during those one or two hours that you worked out there?

A. We started to load up with cement and aggregate and started to haul.

Q. What did you load?

A. Aggregate and cement.

Q. What is aggregate?

A. Stone, gravel and cement, that is, the cement is added to it.

Q. What is aggregate used for?

A. In the paving of a cement highway.

Q. Where did you get the aggregate?

A. Right out of the batch bins at the construction site. That is the way they set up their bins for their work.

Q. You hauled that material to the paver laying the cement highway, is that true?

[fol. 114] A. That's right, and they done the mixing themselves.

Q. You hauled the dry material to the cement mixer?

A. That's right.

Q. What is a batch?

A. Well, a batch is a yard of cement.

Q. The dry ingredients?

A. Yes. The cement is in one compartment and the stone aggregate is in the other compartment and they come out together. The paver mixes it up together and he puts it on the highway.

Q. Are these compartments on the trucks?

A. The compartments is on the trucks, that's right.

Q. How far was the source of supply of batch material

from the place where the paver was laying concrete that day?

A. The distance we had to haul?

Q. Yes.

A. It was a distance, I would say, not over four-tenths—three- or four-tenths of a mile.

Q. How long did your two or three drivers work that day?

A. They made one or two trips at the most; about two trips, I would say, at the most.

Q. How much time did that take?

A. I would imagine about an hour and a half for the two trips.

Q. About what time did you start that day?

A. About nine o'clock in the morning.

Q. Did you stop before noon that day?

A. Yes, sir.

Q. Why did you stop working that day?

A. Mr.—there was this—I don't know who it was; I would think it was the project engineer, he told us we had to take our trucks off the job.

Mr. Hafer: Objection, your Honor, to that conversation. [fol. 115] The Court: Objection overruled.

Mr. Hafer: There is no showing in the record as to the identity of the person who came out there, who he represented or what his name was.

The Court: He said he was the project engineer. Was it the project engineer who told you that or someone else?

A. The project engineer from Lauder & Son. He said we had to take our trucks off the job because of the union.

Mr. Hafer: I object to these hearsay statements.

They certainly can't be binding on us.

The Court: I assume it will be connected up. Standing alone it would mean nothing.

Mr. Stauffer: If the Court please, it will be connected up.

The Court: Very well.

By Mr. Stauffer:

Q. Mr. Bean, while you were there at the Fremont bypass job, did you observe anyone come to the construction site there that had any connection with Morton?

A. With Lester Morton?

Q. Yes.

A. With his business?

Q. Yes.

A. No, sir, only myself.

Q. Did you observe anyone come out there who had any connection with Teamsters Local 20?

A. Yes, sir.

Q. Who was that?

A. Larry Evans.

Q. How did he come out there, in a car?

A. He came in a car.

Q. Was anyone with him?

A. That I can't say. I saw him come out of the office and get in his car.

The Court: Was this before or after?

[fol. 116] A. After. Mr. Larry Evans come out of the office and the project engineer told me I had to take my trucks off the job. That is when I saw Mr. Larry Evans.

Mr. Stauffer: You may inquire.

Mr. Hafer: I would like to renew our motion to strike this testimony. It was not at any time connected up, the statement of this witness.

The Court: The evidence is circumstantial. He testified that he saw Mr. Evans come out of the office and the project engineer then told him to take his truck off the job.

Mr. Hafer: That does not concern the testimony of the project engineer as to what Mr. Evans told him, told the project engineer, and we move that it be stricken.

The Court: The testimony will stand.

Cross examination.

By Mr. Hafer:

Q. Mr. Bean, where were you at the time Mr. Evans was in the shack with the construction engineer?

A. I was in my pickup truck right outside the office while my trucks was running.

Q. Did you overhear the conversation between Mr. Evans and the construction engineer or project engineer?

A. No.

Q. So that you have no personal knowledge then as to what Mr. Evans said, if anything, to the project engineer?

A. No, sir.

Q. You testified, I believe, that you worked on the first day of the strike around the yard of the company?

A. That's right.

Q. And you testified that perhaps a week after the strike started you made your first driving trip?

A. That's right; maybe it was more or less.

[fol. 117] Q. I understand that. During the period of time from the first day of the strike until you made your first driving trip did you continue to work around the yard or garage?

A. I worked in the garage as a mechanic.

Q. Did any of the other drivers or employees of Morton work in the same area with you during the strike?

A. Yes.

Q. How many?

A. Well, there was Mr. Howard Stultz.

Q. Each of those days you and Mr. Stultz worked together was before your first driving trip?

A. Yes.

Q. After the first driving trip did you do any more truck driving, say, a week after the strike until the strike was ended?

A. I don't recall that, but after he got his court order I went on another job.

Q. For Mr. Morton?

A. Yes.

Q. And that was what kind of work?

A. I was a foreman and driving a truck.

Thereupon, Plaintiff called as a witness, Mr. CHARLES ROBISON, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Py:

Q. State your name for the record, please.

A. Charles Robison.

Q. What is your business or occupation?

A. I am Plant Manager for The France Stone Company.

Q. Where is that located?

[fol. 118] A. At the stone quarry at Bellevue and Bloomville, Ohio.

Q. Calling your attention to 1956, Mr. Robison, do you recall when there was a strike at The Morton Trucking Company?

A. I do.

Q. How did you first gain information relative to that strike?

A. Well, I drove in the plant and I saw some men there at the end of the drive.

Q. By that you mean your plant at The France Stone Company?

A. Yes, sir.

Q. Were there some men there with signs?

A. Yes, sir.

Q. Subsequent to that did you see an official of the union? Did an official of the union call upon you?

A. Well, it was after I had drove in that a fellow drove into the place in a car.

Q. And was he alone?

A. Yes, sir.

Q. He came in and introduced himself to you, did he?

A. Yes, sir.

Q. What name did he give you at that time?

A. I don't recall that.

Q. You don't recall the name?

A. No, I don't.

Q. Did he show you some credentials?

A. No, sir.

Q. What is it he told you at that time?

Mr. Hafer: Objection. First of all, your Honor, we have no name. We have a man in a car with no credentials and he now wants testimony as to this conversation.

The Court: You had better have him identified.

Mr. Py: I am trying to do that, your Honor.

[fol. 119] By Mr. Py:

Q. Has anyone talked to you about the testimony you were to give in this case?

A. No.

Q. What kind of a car did this man drive up in?

A. As I recall, he was driving a black Cadillac.

Q. How tall was he, if you recall?

A. I would say he was just an average sized man, as I recall. This has been some time ago.

Q. That would be about how tall? How tall are you, sir?

A. 5-9½.

Q. Was this man as tall as you are or taller?

A. Around my height or he could have been a little taller.

Q. And a man about what age?

A. I suppose possibly around 45.

By Mr. Py:

Q. What did he tell you, Mr. Robison, so far as his identity was concerned?

A. He said he represented the Teamster Union.

Q. Did he tell you what local?

A. Not to my knowledge.

By Mr. Py:

Q. What else did he say with reference to his identity?

A. Nothing to my recollection. He said he represented the Teamsters Union.

Q. What was the conversation you had?

A. As I recall, he told me he represented the Teamster Union and that they were on strike at The Lester Morton Trucking Company, and he asked me not to have our men load Lester Morton's trucks.

Mr. Py: That's all.

[fol. 120] Mr. Hafer: We move that this witness's testimony be stricken.

The Court: I will sustain the objection unless you can identify the man.

Mr. Py: He identified himself as being a representative of the union that had Lester Morton on strike, is that correct?

The Court: (Interposing) I will sustain the motion unless he is further identified.

By Mr. Py:

Q. Do you see the man who called upon you in this courtroom?

Q. Can you point out the man who called on you, Mr. Robison?

A. No, I can't.

Q. Have you seen him in the hall since you have been here in this building?

A. Not to my knowledge, no.

Q. Mr. Robison, how many days did you see the picket signs at the entrance to your quarry?

A. Just that one day.

Q. And following that, the following day did you go in the same entrance?

A. Yes, sir.

Q. So far as your recollection is concerned, Mr. Robison, they were there one day?

A. If my memory serves me, it was the one day.

Q. Did you tell Mr. Olds subsequent to your conversation with this man that he might be contacted by this man?

A. Yes.

Mr. Hafer: Objection, your Honor, and I move that the answer be stricken.

[fol. 121] The Court: It may stand.

Mr. Py: You may inquire.

Mr. Hafer: Is my understanding correct, your Honor, that the testimony with respect to the alleged conversation between this witness and the purported representative of the Teamsters Union has been stricken?

The Court: That is right.

Thereupon, the Plaintiff called as a witness, MR. LAWRENCE EVANS, who, having been previously duly sworn by the Clerk, testified as follows:

Cross examination.

By Mr. Py:

Q. Will you state your name for the record, please?

A. Lawrence L. Evans.

Q. How old are you, Mr. Evans?

A. Fifty-five.

Q. What is your business or occupation?

A. Business agent and trustee of Local 20, Teamsters Union, Toledo, Ohio.

Q. You are an officer of that union?

A. I am, sir.

Q. Prior to that what did you do?

A. I have been an officer of the local for 20 years. Prior to that I came out of the Army.

Q. Mr. Evans, in August, 1956, there was a strike called at Larry Morton's operation, was there not?

A. Lester Morton.

Q. Lester Morton. Excuse me. Subsequent to that did you take some men over to The France Stone Quarry and have them put up picket signs over there?
[fol. 122] A. That I did, yes, sir.

Q. Did you go down there and talk with Mr. Robison about not loading Mr. Morton's trucks?

A. I don't remember talking to Mr. Robison.

Q. You don't deny it, do you?

A. I wouldn't say I did. Five years is a long time ago. You talk to a lot of people. I am not sure if I did or not.

Q. Well, did you talk to Mr. Olds out at The France Stone Company's quarry?

A. I don't recall talking to him.

Q. What kind of a car do you drive?

A. A Buick.

Q. What year? Or what kind of a car were you driving in 1956?

A. An Oldsmobile.

Q. Mr. Evans, you don't recall the names, but do you recall going into France's office or an office on the France property?

A. I was in on France's property four or five times.

Q. At the time of this strike?

A. Before and after, too.

Q. Do you remember going into an office on their premises and talking to someone about the Morton strike?

A. No, sir, I don't.

Q. But you were on the premises at about that time; did you talk with anyone on the premises at that time?

A. Not on the premises. There were pickets on the picket line. I was at the quarry prior to the time of the strike and prior to the time the pickets were put out.

Q. Do you recall who you spoke with?

A. No.

Q. You may have or may not have spoken to Mr. Robison, is that true?

A. I don't know the names. I talked to four or five [fol. 123] people over there over a period of three or four months. I serviced that territory.

Q. Did you solicit their aid in connection with this strike at Morton's?

A. I did.

• By Mr. Py:

Q. You did talk to somebody?

A. Not on the premises.

Q. But you said you talked to someone about giving you aid in connection with the strike, right?

A. That was a mechanic that lived up the street from the quarry.

Q. A mechanic for The France Stone Company?

A. Yes.

Q. What was his name?

A. I don't remember his name.

Q. But he was an employee of The France Stone Company?

A. Yes, sir.

Q. You asked for his help or assistance in your problem, the problem that you were having then with Lester Morton?

A. That is correct.

Q. What did you ask him?

A. I asked him for a little support over there, and I also said, "How would you people go? What reaction would you people have if we came over and talked to them in a meeting?" and he said he didn't think we would get any help.

Q. But it was worth a try to see if you could get their support?

A. Yes.

Q. And you did give it a try and didn't get anywhere?

A. Yes.

Mr. Py: With that, your Honor, I think the testimony of Mr. Olds becomes material.

[fol. 124] The Court: He does not say that he talked to Mr. Robison.

Mr. Py: He says he talked with a mechanic, your Honor.

The Court: Did you go into the office of the superintendent?

A. No, sir. I went to his house up the street, and it must have been three or four blocks away on the same street coming directly out of the quarry.

The Court: That was the mechanic's house?

A. Yes, sir.

The Court: How about Mr. Robison? You saw him on the witness stand, didn't you?

A. Yes, but I don't recall him, sir.

The Court: He is the plant superintendent there.

A. That I would know.

The Court: Did you go into his office, the plant superintendent's office, at the time you placed the two pickets out at France's property?

A. I went over to the other place and stayed with the other picket and I was there nine or ten hours and then I left there and was relieved by another agent and two other pickets.

By Mr. Py:

Q. But you did seek help from this mechanic?

A. Yes.

Q. What union did he belong to, if he did belong to a union, Mr. Evans?

A. I think the mechanics union, or I imagine the mechanics union.

Q. You didn't know him when you went up to his house?

A. No.

Q. And you went up to his house as one union man to another and asked for his help?

[fol. 125] A. Yes, and where I got the information he worked there and lived up there was from one of the pickets.

Q. He told you he didn't know how his employer would react to that?

A. No, sir.

Q. I thought I understood you to say you did feel out the employer or the company?

A. Not at the stone quarry.

Q. But this mechanic you are talking about worked for the stone quarry, did he not?

A. Yes, sir.

Q. Did you determine how the company felt about it?

A. Well, I was relieved from duty and was followed up by another agent there.

Q. Who was the other agent, do you know?

A. I am not sure. I would have to find out from the weekly reports. It could have been Bill Reagan, Kennedy, or it could have been Mowry, one of those three agents.

Q. Mr. Evans, when you say you went to the home of this mechanic how did you determine that it was located several blocks away from the France quarry?

A. It was up the road, outside the property and in the middle of the town of Bloomville.

Q. But do you recall how you found the place?

A. I told you one of the pickets knew the residence of one of the persons who worked in the plant there.

Q. Did this picket who told you this go with you to see this mechanic?

A. No. He told me it was a green house or something like that and he identified where it was.

Q. Would you be able to point out the house?

A. I don't think so.

Q. You didn't know the address?

A. No.

[fol. 126] Q. What time of the day was it when you got there?

A. It was in the afternoon. I would say it was between 5:30 and perhaps 6:00, somewhere along in there.

Q. Was it next to any landmark such as a filling station or grocery store or anything like that?

A. I don't remember that.

Mr. Py: Nothing further from this witness.

Direct examination.

By Mr. Hafer:

Q. Mr. Evans, is Teamsters Local 20 incorporated under the laws of the State of Ohio?

A. No.

Q. It is a voluntary association, is that correct?

A. Yes; it is a labor organization.

Q. At the time you talked to this unidentified mechanic did the conversation take place at his house?

A. That is correct.

Q. Who was present at the time of the conversation?

A. Himself and myself. I think perhaps there was someone in the kitchen of the house. Perhaps it might have been this man's wife.

Q. To your knowledge, was there any work stoppage by the employees of The France Stone Company at or about the time of the Morton strike?

A. No, sir, there was no work stoppage.

Q. You say you were there one day?

A. I was on there eight or nine hours.

Q. Did you stop anyone coming in or out of that France property?

A. No one was refused entrance and quite a few went in and out, that's right.

Mr. Hafer: That will be all.

[fol. 127] Thereupon, the Plaintiff called as a witness, MR. HOWARD STULTZ, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Howard Stultz.

Q. Where do you live?

A. 107 Jackson Street, Tiffin.

Q. For whom did you work in 1956?

A. Lester Morton.

Q. Do you still work for him?

A. No.

Q. When did you leave his employ?

A. A month ago today.

Q. And where are you now working?

A. Hansen Machinery.

Q. Where is that?

A. In Tiffin.

Q. When did you first go to work for Mr. Morton?

A. I started in May of 1950.

Q. Did you work there substantially all the time from that time until the last month or so?

A. That's right.

Q. What were your duties in August of 1956?

A. I was a mechanic and drove extra on a truck.

Q. During the month of August, 1956, Mr. Stultz, did you belong to any union?

A. Yes.

Q. What union was that?

A. Local 20.

Q. Are you familiar with the strike that occurred at Morton's place of business in August of 1956; do you know about it?

[fol. 128] A. Yes.

Q. Did you work during the strike?

A. Yes.

Q. Did you picket at all?

A. No.

Q. Did you work on the first day of the strike?

A. Yes.

Q. What did you do that day?

A. I worked in the garage as a mechanic.

Q. You did not drive a truck that day?

A. No.

Q. Did you drive a truck at all during the strike?

A. Yes.

Q. What was the first day you drove a truck during the strike; that is; how many days after the strike began?

A. About the third or fourth day; I don't just recall now just how many days it was.

Q. Did anyone else drive a truck that day for Morton?

A. Yes; Vernon Bean and Clifford Smith.

Q. Did you work together in a group?

A. Yes.

Q. What did you do?

By Mr. Stauffer:

Q. Mr. Stultz, what did you do that day?

A. Hauled sand into Toledo.

Q. Where in Toledo?

A. To Schoen Asphalt Paving Company.

Q. You were driving dump trucks?

A. That's right.

Q. Did you leave the Morton premises loaded with sand?

A. No.

[fol. 129] Q. Where did you get the sand?

A. At Dolomite, Inc.

Q. Where is that located?

A. Maple Grove.

Q. And where is Maple Grove?

A. About nine miles north of Tiffin.

Q. Where is the Schoen Asphalt Paving Company located?

A. In Toledo, Ohio.

Q. You drove there that day?

A. Yes.

Q. What did you observe when you got there? Did you observe anything unusual?

A. Well, there was some automobiles setting there.

Q. There were automobiles setting where?

A. At Schoen Asphalt Paving Company.

Q. Inside the gate or on the street?

A. Outside.

Q. Did you see any people standing about the automobiles, standing by the automobiles?

A. Yes.

Q. What were they doing?

A. Just standing around the cars talking.

Q. Did you see any signs?

A. No.

Q. What did you do? Did you drive on in?

A. Yes.

Q. Then what did you do? Did you then unload your sand?

A. No.

Q. What did you do with your truck?

A. I left it sit.

Q. You left your truck sit?

A. That's right.

Q. What about the other two trucks?

[fol. 130] A. They was left to sit, too.

Q. Why were they left there sitting?

A. On order of Mr. Schoen or whoever was in charge.

Q. Did anyone give you an order or any instructions?

A. They just came out and told us to leave the trucks sit.

Q. Who told you that?

A. The man that came out of the office.

Q. Did Mr. Morton come to the Schoen property or place of business that day?

Mr. Hafer: I move that this testimony be stricken until we have some identification of the man.

The Court: Objection overruled. He may proceed.

By Mr. Stauffer:

Q. Did Mr. Morton come to the Schoen property that day, Mr. Stultz?

A. Yes, he did.

Q. Did you leave with him in his automobile?

A. Yes.

Q. Were the trucks loaded or unloaded at the time you left the Schoen property?

A. The trucks was still loaded.

Q. Did Mr. Morton give you any instructions about the trucks as to loading or unloading them?

A. I can't recall.

Q. But you do recall that when you left the Schoen property they were still loaded?

A. Yes.

Q. How long were you at the Schoen premises?

A. About—

Q. (Interposing) Was it more than an hour?

A. No, we weren't there an hour.

Q. Less than an hour?

A. Less than an hour.

Q. Were these men that you saw there in automobiles still at the gate when you left Schoen's?

[fol. 131] A. Yes.

Q. Did you observe any signs at that time?

A. I couldn't answer that because I don't know.

Q. Do you recall seeing any signs at all while you were there?

A. No.

Q. Did you drive a truck on any other day other than the day you drove to Schoen's?

A. Yes.

Q. Do you recall whether you drove again the next day or not?

A. I don't recall whether it was the next day or not.

Q. Do you recall whether you ever drove into The France Stone Quarry during the course of the Morton Strike?

A. Yes.

Q. Do you recall whether you saw any signs at the entrances to The France Stone Company property?

A. Yes.

Q. Do you recall whether you saw the signs there on more than one day?

A. Yes, I think they were.

Q. Do you recall how many days they were there?

A. At least two days.

Q. How many entrances are there to The France Stone Company property, Mr. Stultz?

A. Two.

Q. Did you use both of them on those two days or just one?

A. Just the one.

Q. Which road does it come out onto? Do you know the name of the road?

A. No, I don't.

Q. How many signs did you see there?

A. I just saw the one sign as I went into the quarry.

[fol. 132] Q. What did that sign say, if you can recall?

A. "Morton Trucking Company on Strike," or something to that effect.

Q. Was any union's name on those signs, if you know?

A. I don't know. I don't remember.

Q. Where were you hauling to when you were going in and out of the France Stone Quarry?

A. To the Route 224 bypass around Tiffin.

Q. How far from the quarry was that, approximately?

A. Approximately ten miles.

Q. How many hours a day were you working on those particular days, Mr. Stultz?

A. An average, I suppose, of about nine hours a day.

Q. How late in the day did you work on those days?

A. I suppose around between 5:30 and 6:00.

Q. What was the latest time on each of those days that you came out of The France Stone Quarry?

A. Well, it would have to be 4:30 because they close at 4:30.

Q. Do you recall whether or not you saw that picket sign on your last trip out there?

A. I don't know.

Q. Did you see anyone at the entrance standing by with a sign?

A. Yes.

Q. Was there one person there or more than one person?

A. There was two.

Q. Did you recognize either one of them?


A. One day it was the two Combs boys.

Q. What are their first names? Would it be Jack and Joe?

A. Yes.

Q. Who else did you recognize there with the signs?

A. And Nye.



[fol. 133] Q. Who is Nye?

A. He was one of the fellows on strike.

Q. He was an employee of Morton?

A. Yes.

Q. Was he the union steward, if you know?

A. I don't know if he was the union steward then or not.

Mr. Stauffer: You may cross-examine.

Cross examination.

By Mr. Hafer:

Q. On the day or two, Mr. Stultz, that you saw picket lines at the France Quarry did you proceed to cross the picket line and go into the quarry to be loaded?

A. Yes.

Q. What were you picking up on that day? What was the nature of the load you were traveling with?

A. No. 1 and No. 2 stone.

Q. Did you have any difficulty getting loaded when you drove into the quarry area?

A. No.

Q. Was that true on both of the days you observed the pickets out there?

A. Yes.

Q. In point of distance, Mr. Stultz, how far was the picket sign that you saw from the actual quarry area where the loading was done? Was it a mile, or more or less than a mile, a half-mile?

A. That would be less than a half-mile.

Q. Could you observe from the point where the pickets were placed the actual operation of the quarry; that is, the employees in the quarry?

A. Part of it.

Q. What part of the operation could you see from that distance?

A. The part where they were loading.

[fol. 134] Q. The loading area?

A. Yes.

Q. What was the nature of the loading facility out there? What kind of equipment did they use out there?

A. They used front-end loaders.

Q. At the time your truck was being loaded on the two days you were there could you see the picket signs from the loading area?

A. No, you couldn't see the picket signs.

Q. Could you see the individuals who were in possession of those signs from the loading area?

A. Yes.

Q. What were they doing?

A. They were sitting in their cars.

Q. You could see their cars, in other words, but you couldn't see the signs; is that what you are saying?

A. That's right.

Q. In any event, on both of the days the pickets were at the entrances you were loaded as usual at The France Stone Quarry?

A. Yes.

Q. You went in as usual and left as usual, is that right?

A. Yes.

Q. At any time while you were on the premises of France's Quarry after the strike started, Mr. Stultz, was there any work stoppage that you observed there, any strike or any cessation of work?

A. None that I observed.

Q. Isn't it a fact, Mr. Stultz, that the loading facility at France's is a diesel about 500 feet from the road level?

A. It is not.

Q. Is it your testimony that the road you entered into the France Quarry was on the same level, roughly speaking, as the loading facility or loading area for the trucks?

A. No.

[fol. 135] Q. Explain to me what the relationship is in point of elevation between where the pickets and their cars were and the area in your truck was being loaded?

A. The pickets and their cars was approximately,—I'm no judge of distance now,—but I would say approximately about 40 feet higher than where I loaded with a couple of loads. I wasn't hauling 1's and 2's all the time.

Q. Is there more than one loading area out there?

A. Yes, there is several of them.

Q. Some of them are in a pit?

A. Yes, some in a pit. They have three loading areas on top of the ground.

Q. During the one or two days you were there and saw pickets some of your loads were taken from the pit and some not?

A. Yes, sir.

Q. When some of your loads were taken from the pit area could you see the pickets' cars?

A. Not from the pit, no.

Mr. Hafer: That's all I have of this witness.

The Court: Did you load directly from a crusher or from a pile with reference to the 1's and 2's?

A. We loaded out of the bin, or out of the plant itself, out of the crusher itself.

The Court: That would be above the quarry then?

A. Yes.

[fol. 136]

Morning Session
Tuesday, April 25, 1961
9:30 o'clock A. M.

The Court: You may proceed.

Thereupon, the Plaintiff called as a witness, Mr. ELMER B. LITTRELL, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Py:

Q. Will you state your name for the record, please?

A. Elmer B. Littrell.

Q. Where do you reside?

A. 3264 Erawa Drive, Toledo, Ohio.

Q. In the months of August and September, 1956, by whom were you employed, Mr. Littrell?

A. Launder & Sons, Inc.

Q. Who is Launder & Sons, Inc.?

A. They are general contractors engaged in road construction for the State Highway Department.

Q. Are you now employed by Launder & Sons?

A. No, sir, I am not.

Q. When did you leave their employ?

A. In December, 1958.

Q. In what capacity were you employed by Launder & Sons?

A. At that time I was Field Office Manager and had charge of the batch plant area.

Q. You were a batch plant manager or in charge of it?

A. Yes, that's right.

Q. In August of 1956 was your employer engaged in a highway project, paving contract?

[fol. 137] A. Yes, sir.

Q. Where was that?

A. Fremont, Ohio.

Q. Was that known as the Route 20 by-pass?

A. Well, there were two there Route 20 and Route 53.

Q. Do you remember when Morton Trucking had a strike?

A. Yes.

Q. Where were you working then?

A. I believe it was on Route 20, if I am not mistaken.

Q. Were you using Morton's trucks on that job before the strike?

A. Yes, sir.

Q. Were those dump trucks you were using, Mr. Littrell?

A. Yes, sir.

Q. What kind of trucks did Morton use on that job?

A. Well, they were batch trucks, dump trucks equipped to haul batches for concrete paving.

Q. What do you mean by "batch trucks"?

A. Well, dump trucks that are segregated. The batches of dry materials were separated, one from the other.

Q. Where did they pick up the dry material?

A. At the batch plant.

Q. Was that operated by Launder & Sons?

A. Yes.

Q. And that plant was located on this project somewhere?

A. Yes, sir.

Q. And they would haul from there to the paver on the road?

A. Yes, sir.

Q. Do you recall how you learned of the strike, Mr. Littrell, at Morton's?

A. Well, I don't recall exactly. Let's put it this way: [fol. 138] I was informed either by Mr. Launder or someone else in responsibility that there was a strike on.

Q. After the strike, was there some arrangement made to use Morton's trucks?

A. I believe we tried to make arrangements to use them; I don't know exactly for how long.

Q. Was there an arrangement made whereby you did use the trucks?

A. I can't recall offhand.

[fol. 139] Q. After the strike did Morton's trucks appear on the job of Launder's at any time?

A. Yes, sir.

Q. Do you recall how many trucks appeared on the job?

A. I believe only three.

Q. How long did they stay on the job?

A. Just for a short period of time.

Q. Will you tell the Court why they stayed there for only a short period of time?

A. We—I received a phone call asking—from someone from the Teamsters—asking if there were trucks on the job.

Q. What did you say?

Mr. Hafer: Just a minute. Objection. I move that the last answer be stricken. We have no identification of the person allegedly making the telephone call.

[fol. 140] The Court: I will hear what he says before I take any action on the motion.

Q. Will you tell the Court who it was you received that telephone call from?

A. The person on the phone said he was Larry Evans from the Teamster Local.

Q. What did he ask you?

A. If there were Morton trucks on the job.

Q. What did you tell him?

A. Yes.

Q. What did he say to you then?

A. Well, he asked,—just a minute. There was something about a picket line mentioned if we continued to use them. Now, I asked, if I am not mistaken, whether or not a restraining order had been issued, and I don't know anything about that and I never had definite proof that a restraining order had been issued.

Mr. Hafer: I object to that, your Honor, first on the ground that the witness has testified,—

The Court: (Interposing) The answer pertaining to the restraining order may go out.

Mr. Hafer: This witness has testified that he is a managerial representative, that he was such representative at the time, and any conversation between him and another agent is not competent. I might also say that there has been no positive identification here, and I ask that I may be permitted to take the witness on voir dire with respect to this caller.

The Court: Do you want to cross-examine at this point?

Mr. Hafer: Yes, your Honor, with reference to the identity of the caller at this time, on voir dire.

The Court: Very well. Proceed.

[fol. 141]

Cross examination.

By Mr. Hafer:

Q. With reference to the telephone conversation with the person identifying himself as Mr. Larry Evans, how many times prior to that had you talked to Mr. Larry Evans on the telephone?

A. I couldn't rightfully say. That would be, oh, within a short period of time; maybe three or four times.

Q. Had you met Mr. Evans prior to the time you received the telephone call you are talking about?

A. I may have.

Q. Well, do you recall having met him?

A. I don't definitely recall it now.

Q. Did you recognize that voice as being the voice of the man you knew as Larry Evans?

A. Well, I would say that I would, yes, sir.

Q. You gave a deposition in connection with the state court proceeding, did you not, sir?

A. Yes, sir.

Q. In the course of the deposition,—

Mr. Py: (Interposing) On what page is that, Mr. Hafer?

Q. (Continuing) In the course of your deposition in the state court proceeding at the top of page 12, for the record, do you recall being asked the question: "Q. Did you recognize his voice over the telephone?" and you gave the answer, "A. I do not think I would recognize it again. I never dealt with the man before in my life, but I know who he was."

A. If I said that, then that is true.

Q. I will show you a copy.

A. I have probably read it.

Q. I will show you at the top of the page. Look at it. It is at the top of page 12. (Handing the said deposition to the witness.)

Did I accurately read the deposition?

[fol. 142] A. Yes.

Q. Let me ask you again then: when this man called you up on the telephone from the Teamsters Union and said he was Larry Evans did you at that time recognize his voice?

A. I more or less took it for granted that it was him.

Q. Did you recognize the voice as being the voice of the man you knew as Mr. Larry Evans?

A. I can't say that, no, sir.

Q. Your testimony is that the man said he was Larry Evans and you took his word for granted, took his word for it?

A. That's right.

Q. But you didn't independently recall the voice of the man you knew as Larry Evans?

A. I never knew a Larry Evans before that.

Q. You never knew him before that?

A. That's right.

Q. This telephone conversation with a Mr. Larry Evans was the first conversation you had with the man purporting to be Larry Evans, is that right?

A. Let's put it this way: I have talked with the man over the telephone.

Q. Before or after this conversation?

A. Before.

Q. Before?

A. Yes.

Q. Did you recognize this voice when the call came through on this particular occasion when a picket line was mentioned?

A. The only way I could recognize it was his voice was that I had my dealings with him over the phone. I had no authority at the time to make any decisions, no authority to make any dealings with anybody.

Q. My only inquiry here is whether or not you recognized [fol. 143] the voice of the man who called you on this occasion, whether you recognized that voice as being the voice of Larry Evans or did you merely take his word for it?

A. I took it for granted evidently, because after all I deal in good faith, too.

Q. I see.

Mr. Hafer: That's all I have, your Honor. I move at this time that his testimony be stricken.

The Court: Mr. Littrell, you have said on direct examination that Mr. Evans called you and asked if Morton's trucks were on the job, and you said later you thought it was Larry Evans' voice; now you say you don't know. What is the fact now?

A. Well, I just,—the only time, your Honor, I ever talked with Evans was over the phone and I had to assume the man I was talking to was Mr. Evans. I had never dealt with the man personally.

Redirect examination.

By Mr. Py:

Q. On the previous occasions when you talked with Mr. Evans what did you talk about, what matters did you talk about?

A. That would have something to do with Teamster business.

Q. Union business?

A. Yes, sir.

Q. On the occasion when he called you with reference to Morton's trucks you recognized it as the same voice, did you?

A. Yes, sir.

Q. And it was about union business, too?

A. Yes, sir.

Mr. Hafer: May we have a motion to strike that testimony on the grounds stated?

The Court: The objection will be sustained.

[fol. 144] By Mr. Py:

Q. Tell the Court what further conversation you had with the person you are assuming or assumed to be Mr. Evans at that time?

A. Well, I told him there were Morton trucks on the project, that's true, and there was some mention about a roving picket line, which I told him at the time that we didn't want any trouble with anyone so far as I knew, and that was the entire gist of the conversation.

Mr. Hafer: Objection, your Honor, and move that that be stricken on the grounds of no proper identification.

The Court: Overruled.

Mr. Hafer: (Interposing) Did your Honor sustain the objection before?

The Court: Yes, as to leading questions upon the part of counsel.

Q. After the telephone conversation what did you do?

A. Well, I advised the representative of Morton Trucking Company to take his trucks off.

The Court: I didn't hear that.

A. I advised the representative of Morton Trucking Company that he should take his trucks off, that since we were in a paving operation we didn't want to be in a position where we could have anything happen which would put our operation in jeopardy.

Mr. Hafer: Objection, your Honor, and move that the latter part of the answer be stricken with reference to why he told this representative that. That is certainly not binding on us.

The Court: I only want to know what was said. That is the only reason I am allowing this testimony. So far there has been no identification of the voice, that it was Larry Evans who called.

Mr. Hafer: I am talking about the conversation with this witness with a Morton representative. We don't want [fol. 145] to be bound by the reason he gave Morton's man for what he did. If he testified he made the statement, I make no objection to that.

The Court: It may stand.

Q. After you made that statement to Morton's representative Morton's trucks no longer worked on that job?

A. That's right.

Mr. Py: That's all, your Honor.

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Cross examination.

By Mr. Hafer:

Q. Mr. Littrell, will you tell the Court in some detail, if you will, what your duties as field office manager and being in charge of the batch plant involved?

A. Well, I kept track of the operations around the batch plant so far as trucks was concerned, but I could make no decisions on a management level, and most of the stuff I was doing was on instructions from somebody else.

Q. Did you make recommendations with regard to management policies?

A. No, sir.

Q. Did you have anything to do with the supervision of the work in the field?

A. No, sir.

Q. What duties did you have in the field?

A. Other than taking care of the,—looking after the operation of the batch plant is about all.

Q. That is a portable unit, isn't it?

A. No, sir, it is stationary.

Q. Was the batch plant located on the premises of Launder & Sons or on the job?

A. Well, it was part of the,—it is part of the project itself. We had our field office in that vicinity, too.

Q. When you were in the field did you occupy the field office where you did your work?

A. Yes, sir.

[fol. 146] Q. What work did you do when you were in the field office?

A. Well, we were mainly interested in cost, ordering materials, and taking care of labor needs that different supervisors wanted.

Q. If a supervisor came to you and asked for men it was your job to see that the men got there?

A. Yes.

Q. Do you have an accounting background?

A. Yes, sir.

Q. What degrees, if any, do you hold?

A. A B. B. A. from the University of Toledo.

Q. Are you an accountant by profession?

A. No.

Q. Are you a Certified Public Accountant?

A. No, sir.

Q. But you worked for Launder & Sons doing some accounting work?

A. Yes.

Q. What did you do specifically as the man in charge of the batch plant?

A. I made sure that they had materials and that the

trucks were running, hauling the dry batch materials, and that supplies were coming in.

Q. Part of your work was to see that the operation would be continuous?

A. Yes, sir.

Q. Did you in the course of your work make direct contact with the customer from whom you were purchasing your raw materials?

A. By phone, yes.

Q. In other words, you would place the orders for the cement or whatever other materials you needed?

A. Yes, sir.

Q. And you had the authority to do that for the company?

[fol. 147] A. Yes.

Q. Did you make those purchases on a credit basis?

A. Yes, that was customary in the industry.

Q. What was the volume of purchases for which you were responsible, say, in the year 1956 to the best of your judgment?

A. That would be hard to figure.

Q. \$50,000.00, \$100,000.00, \$200,000.00?

A. No. I would imagine several,—about in the neighborhood of \$300,000.00 or \$400,000.00.

Q. You were responsible for purchases of materials for Launder in that amount?

A. I ordered them, yes.

Q. Did the men who were the foremen actually supervising the men, the employees, report to you in connection with their labor needs on the job?

A. Yes, sir.

Q. What about the batch plant; was there a foreman of the batch plant who did the actual supervising work there?

A. No; I was it.

Q. You were the foreman at the batch plant; that is, you actually supervised the men at the plant, batch plant?

A. Yes, at the time they were there. Of course, we worked in the,—that is, we worked in conjunction with the paving superintendent and he was the one I was work-

ing under when I was there working at the batch plant. As far as the office is concerned, I was working under Mr. Launder.

Q. How many men worked at the batch plant, Mr. Littrell, excluding truckdrivers?

A. Three.

Q. Three men who worked at the batch plant itself?

A. Right.

Q. In addition to that, there would be a flow of truckdrivers coming through to get their loads?

[fol: 148] A. Yes.

Q. Were you also responsible to see to it that these truckdrivers kept moving through the batch plant and that they were not congregating?

A. Well, that was the general idea of the position I held. Of course, under the arrangements which we were working under with Mr. Morton, part of it was his because he had his own man out there.

Q. He had a foreman for his trucks there?

A. Yes; but when we were running our own, I was the pusher then.

Q. And when was it that you were running it on your own?

A. That was during the time the strike was on.

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Redirect examination.

By Mr. Py:

Q. Mr. Littrell, who did you talk with in the company you were employed by before you told Mr. Morton to take his trucks off the job?

A. Well, I would have had to talk to Mr. Launder if he was on the job at that time, because I couldn't make any decision relative to that without consulting him.

Q. Do you recall talking to Mr. Launder?

A. I really don't know right now, but I must have if that decision was made. If I am not mistaken,—it is a vague memory;—I did talk to Mr. Launder and he said something about that; but I couldn't tell you truthfully.

Q. Who was Mr. Launder?

A. My employer at that time.

Q. Mr. Brenner Launder?

A. Yes.

Q. What was his capacity at that time?

A. Well, at the time he was general manager, general superintendent, whatever you want to call him.

[fol. 149] Mr. Py: I think that's all, your Honor.

The Court: That will be all. Call your next witness.

Mr. Py: I wonder if we could call Mr. Evans for cross-examination with reference to this telephone call to see if we could tie that up, your Honor.

Mr. Hafer: He has already been called once. Does he have a right to call him repeatedly? Of course, it is a matter of discretion with this Court.

The Court: I think you had better refrain at this time. I assume that Mr. Evans will be called by the defense. You may have an opportunity to cross-examine him then. I think that your problem in this matter has been plain all the way through this trial. A party defendant is the Local of the union. You have got to show definitely that somebody in authority spoke for that Local. It may have hundreds of members, probably even thousands. Any one individual couldn't bind this defendant unless he had proper authority; you understand that.

Mr. Py: That is correct, Your Honor, I understand.

The Court: Both of these witnesses have failed to identify Mr. Evans. I am referring to Mr. Robison and Mr. Littrell. Therefore, any conversation that was had with him over the phone or personally, if they didn't know who it was that they talked to, if there is no identification the testimony can't stand. That is the position the Court has been taking in regard to these witnesses.

Mr. Py: I understand.

The Court: I don't know what it would avail you to call Mr. Evans again for cross-examination in connection with Mr. Littrell's testimony. You may or may not have an opportunity to cross-examine Mr. Evans later.

I think you had better call another witness.

[fol. 150] Thereupon, the Plaintiff called as a witness, MR. KENNETH LIDSTER, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Kenneth Lidster.

Q. Where do you live?

A. 25 Jefferson Street, Tiffin.

Q. For whom do you work?

A. The Louis O'Connell Company.

Q. Where is that company located?

A. It is on 78 Adams Street, Tiffin.

Q. Did you work for that company in 1956?

A. Yes.

Q. What was the business of that company in 1956?

A. Ready-mix and coal.

Q. What did it do about ready-mix?

A. What is that again?

Q. What is ready-mix?

A. That's ready-mix concrete.

Q. What did your employer do about ready-mix concrete?

.

Q. What did this employer of yours do about ready-mix concrete, Mr. Lidster?

A. Mixes it and hauls it out to the job.

Q. Throughout the year 1956 what was your job out there?

A. Driving a truck.

Q. What kind of a truck did you drive?

A. A ready-mix cement truck.

Q. Did you work out there throughout 1956?

[fol. 151] A. Yes.

Q. Who hauled the sand in to your employer's premises in 1956?

A. Lester Morton.

Q. Lester Morton Trucking Company of Tiffin?

A. Yes.

Q. Did that company do that in the early summer of 1956?

A. Yes.

Q. What union, if any, do you belong to?

A. At that time I belonged to Local 20.

Q. Of what union?

A. Teamsters.

Q. Who came to your employer's premises, if anyone, on union business?

A. Mowry.

Q. That was in 1956?

A. Yes.

Q. Do you know that man's first name?

A. Irvin.

Q. Prior to the summer of 1956 did Mr. Mowry occasionally come to your employer's premises?

A. Yes.

Q. Did you ever talk with him on those occasions?

A. Yes, we used to talk.

Q. What were some of the things you talked about?

A. Oh, he usually told us what was going on in the union, one thing or another.

Q. With reference to what union?

A. The Teamsters.

Q. Did he say what connection he had with the union?

A. Well, he was a business agent.

Q. For what union?

A. The Teamsters.

Q. Which local?

[fol. 152] A. Local 20.

Q. Did you have any discussions with Mr. Mowry in August, 1956? If you can't recall, say so.

A. No, I can't.

Q. Did Mr. Morton haul all of the sand that your employer used throughout the summer of 1956?

A. Yes, he did.

Q. No one else ever hauled any sand?

A. Not that I recall.

Q. Did you learn of the strike against The Morton Trucking Company?

A. Yes, I did.

Q. How did you learn about that, Mr. Lidster?

A. Mr. Mowry said,—

Mr. Hafer: (Interposing) I object to that, your Honor, what Mr. Mowry said about the strike. This could only serve to impeach Mr. Mowry's testimony, and there is no showing at this point that Mr. Mowry is an officer of the defendant in the case. In the circumstances, the plaintiff is not entitled to impeach the witness' testimony. He testified in detail where he went and there is no testimony concerning the employees at O'Connell. Hence that testimony would only serve to impeach.

Mr. Stauffer: There is testimony that Mr. Mowry talked to employees at O'Connell's.

The Court: Mr. Mowry was on the stand, was he not?

Mr. Livingston: He was the first witness.

Mr. Py: He is a business agent.

The Court: You may proceed.

By Mr. Stauffer:

Q. What did Mr. Mowry state to you?

A. Well, he come down and he says they was having a strike on at Morton and he would just as soon we didn't use his trucks until they got it settled.

Q. Can you recall anything else he said?

[fol. 153] A. Not at the time, no sir.

Q. Where were you at the time?

A. I was in the yard at the time.

Q. What yard?

A. O'Connell's.

Q. Was anyone else present that could have overheard this conversation?

A. I couldn't say for sure.

Q. Were there any other employees in the yard, if you recall?

A. Yes, there was some men in the yard.

Q. But you can't recall if anyone was with you and Mr. Mowry at the time?

A. That's right.

Q. Did you tell anyone of your conversation with Mr. Mowry?

A. I told Howard Magers, the boss.

Mr. Hafer: I object to this line of questioning. It is immaterial. We also are not bound by what the witness said to his boss.

Mr. Stauffer: The materiality is, of course,—

The Court: (Interposing) The objection will be overruled. It may stand.

By Mr. Stauffer:

Q. Who is Howard Magers?

A. He is our boss.

Q. Where?

A. At O'Connell's.

Q. Your employer?

A. Yes.

Cross examination.

By Mr. Hafer:

Q. I didn't hear very clearly your name. Is it Mr. Lidster?

A. Yes.

[fol. 154] Q. Mr. Lidster, what was the date of your conversation which you have testified to between yourself and Mr. Mowry?

A. Well, getting back that far, sir, I couldn't tell you down to the day.

Q. Could you tell us down to the week?

A. Well, that is quite a ways back.

Q. Can you tell us down to the month?

A. I am afraid I couldn't.

Q. Then as I understand your testimony, Mr. Lidster, you say that there was a conversation you had personally with Mr. Mowry, but all you can recall is that it was sometime in the calendar year 1956, is that right?

A. That's right.

Q. You have no recollection even as to the month in which the conversation occurred, is that correct?

A. On the month, no.

Q. You were a truckdriver for The Louis O'Connell Coal Company?

A. Yes.

Q. Did your duties as a truckdriver in the year 1956 include the procurement or obtaining of more equipment for the company if it needed it? Did you have anything to do with getting more equipment for the company?

A. No.

Q. Did you have anything to do with the leasing of extra equipment for your company?

A. No.

Q. Then you had no authority either to decide to use Mr. Morton's trucks, or if so, how they were to be used?

A. That's right.

Q. But it is your testimony that Mr. Mowry sometime during that year asked you what,—or stated to you rather,—that there was a strike on at Morton's and he would just as soon you would not use his trucks?

[fol. 155] A. Yes.

Q. Were you driving Morton's trucks?

A. No.

Q. He had his own men driving them?

A. He had his own drivers, yes.

Q. As far as you know this conversation, when it did occur, was a conversation between yourself and Mr. Mowry?

A. Yes.

Q. And you testified that later on you told Mr. Mowry about it?

A. That's right.

Redirect examination.

By Mr. Stauffer:

Q. How was your company in 1956 using Morton's trucks?

A. They was hauling their sand and stone.

Q. Who was?

A. Morton's trucks.

Q. Into your employer's premises?

A. Yes.

By Mr. Stauffer:

Q. Tell us again how your employer used Morton's trucks?

A. At the time he had,—he was hiring Lester Morton's trucks to haul stone and sand into O'Connell's.

Q. What did your employer do with it?

A. We used that for our ready-mix concrete.

[fol. 156] Thereupon, the Plaintiff called as a witness, MR. HOWARD MAGERS, JR., who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Howard Magers, Jr.

Q. And your residence?

A. Tiffin, Ohio.

Q. What is your occupation?

A. I am the secretary-treasurer of The Louis O'Connell Coal Company, a building supply concern.

Q. Did you have that same position throughout the year 1956?

A. That is correct.

Q. What does your company do in the building supply line?

A. We are known as a hard goods or materials dealer. We handle brick, concrete blocks, ready-mix concrete.

Q. What is your ready-mix concrete business; what do you do in that regard?

A. That is batching and mixing stone, sand and cement into transit mixing trucks and hauling it to jobs.

Q. Did your company do that type of work in the summer of 1956?

A. It did.

Q. Where did you get them, your materials, for that operation, Mr. Magers?

A. From various quarries in the area.

Q. Who did the hauling of that material to your property?

A. We normally had a contract hauler doing that.

[fol. 157] Q. Who did that hauling in the early summer of 1956?

A. That would have been Lester Morton.

Q. Where is Lester Morton's business located?

A. In Tiffin.

Q. What is his business?

A. Trucking.

Q. Did you have any understanding with Morton in the summer of 1956 as to what he was to do for you?

A. Yes.

Q. And what was that, please?

A. The Morton Trucking Company, hauled for us all materials that we used in the manufacture of ready-mix concrete.

Q. Did you use anyone else other than Morton in the early or late summer of 1956?

A. Yes, we did.

Q. Why was that?

A. At that time we were informed that there was a strike against Morton and we contacted our carriers to do our hauling.

Q. How did you learn about the strike?

A. To the best of my recollection our union steward at the time informed me that the strike had actually taken place.

Q. Was that your union steward?

A. Yes.

Q. Who was that union steward?

A. That was Kenneth Lidster.

Q. About when did he tell you this?

A. This is five and a half years ago. It was, I should imagine—let's see. It definitely was on the same the strike took place, in the morning of the day.

Q. What did he tell you?

A. He had said something to the effect that the Teamster Union had struck against Lester Morton and that he had [fol. 158] been informed of that by a representative of the Teamster Union.

Mr. Hafer: We object to that testimony if it is in any way to be binding upon the defendant. The only evidence we have with regard to Mr. Lidster is the witness's statement that he is a union steward. We have no evidence concerning the nature of his responsibilities or authority.

Mr. Stauffer: It is immaterial as to what union he is a steward of, your Honor. The materiality is that he was an employee of O'Connell's.

The Court: The objection will be overruled. It may stand.

By Mr. Stauffer:

Q. Can you recall anything else of your conversation with Mr. Lidster at that time?

A. There was not too much more conversation that took place at that time because we were more concerned with making sure that we would have an uninterrupted flow of materials coming into the yard.

Q. What did you then do?

A. We then made attempts to contact other haulers to come in and haul our materials for us.

Q. When did other haulers first come in after your conversation with Mr. Lidster?

A. We were able to contact some right away and get some people in to haul our materials for us.

Q. What do you mean by "right away"?

A. Within a matter of two or three hours.

Q. Did the Morton Trucking Company ever again in 1956 haul material into your property?

A. Yes. They resumed hauling materials as soon as the strike had been lifted.

Q. What month was that, if you know?

[fol. 159] A. I believe it was in October. Yes, it was in October (witness referred to paper).

Cross examination.

By Mr. Hafer:

Q. Did you have in the year 1956 a signed memorandum of agreement or signed contract with Morton?

A. Our contract with Morton Trucking was verbal.

Q. You had no written contract providing for his services during any period of time?

A. No written contract.

Q. For what period of time prior to 1956 had Mr. Morton been hauling for you?

A. I became associated with the firm in 1952 and at the time I became associated with the firm he was hauling.

[fol. 160] Q. During the period from 1952 to 1956 did any other trucking company perform any such work as Morton did for you?

A. To 1956?

Q. Yes.

A. Not to my knowledge.

Q. What, precisely, did Mr. Morton furnish to The O'Connell Coal Company?

A. What he precisely furnished was a trucking service.

Q. Did he provide both truck and driver?

A. Yes.

[fol. 165] Q. Did you have any conversations with any representatives, any of the union business agents concerning the strike at Morton's?

A. It is possible, but I don't recall that I did have.

[fol. 166] Q. Was the decision to use other truckers made by you, yourself?

A. As such, yes.

Q. That was within the scope or in the course of your regular duties as secretary-treasurer of the company?

A. Yes.

Q. And you made that decision after learning that Mr. Morton was on strike, is that correct?

Q. At any time after August 1, 1956, were any pickets

A. That's right.
placed at your premises?

A. No.

Q. At any time after August 1, 1956, was there any work stoppage by your employees?

A. No.

Q. Then the decision not to use Morton, I take it, was that if his trucks were on strike—or if his employees were on strike his trucks would not be available to you for your work?

A. Not necessarily.

Q. No one threatened to picket or strike you, had they?

A. No.

Q. And no one in fact picketed or struck you, did they?

A. No.

Q. But as far as you know you learned that Mr. Morton was on strike and as soon as you learned he was on strike you immediately made arrangements to secure substitute trucking services?

A. That is correct.

Q. Will you tell us then why as soon as you learned of the strike at Morton's you went out and got other trucking services?

A. This particular period during which the strike took place is part of what we call our "busy season" and we [fol. 167] wished to avoid at all any possibility of having our place picketed or having our men go out on strike.

Q. That may have been in your mind, but you had no basis for such an opinion based upon any conversation with union business agents, did you?

A. No.

Q. You had no written communications with union business agents during this time, had you?

A. No.

Q. And you had no work stoppages or picketing during this entire period, had you?

A. No.

Q. And as soon as you learned of this strike you made other arrangements?

A. That's right.

Q. You didn't want any part of Mr. Morton when he had labor difficulties; is that the substance of it?

A. Partially.

Q. And the other part was the thought in your own mind that maybe if you used Mr. Morton's trucks you might have some sort of difficulty?

A. Yes.

Q. But that was based on your appraisal of the situation and not on any communications with the business agents of the union?

A. Yes.

Q. Did you have any direct conversation with any officer of the union?

A. Only insofar as the Teamster Union steward who was in our employ talked to me.

Q. And all he did, as I understand his testimony and yours, was report the fact that Mr. Morton was on strike, is that right?

A. There again it is rather difficult to recall the exact conversation that took place at that time, and whether [fol. 168] there was any direct mention of anything else I couldn't recall at this time.

Q. But you remember that he told you that Mr. Morton was on strike?

A. There was conversation to the effect that Mr. Morton was on strike and he had been informed of that.

Q. You can't remember anything else that was said at that time, is that correct?

A. No, that is correct.

Q. During your business season had you ever had occasion in past years to bring in extra truckers?

A. No.

Q. Were the quarries from which the raw materials were delivered during the strike the same quarries from which you were receiving the materials prior to the strike?

A. Yes.

Redirect examination.

By Mr. Stauffer:

Q. During the latter part of your cross-examination here, Mr. Magers, you were questioned about your conversation with your employee, Mr. Lidster, is that correct?

A. Yes, sir.

Q. Did he tell you how he had learned of the strike against Mr. Morton?

A. Yes. He had mentioned that Mr. Mowry, who at that time was the business agent for the union in the area, had told him.

The Court: You mentioned the name of Mr. Mowry. Did Mr. Mowry at any time ever talk to you directly about this matter?

A. It is possible that at some time before the strike took place there may have been some mention that there was a possibility that the strike would take place. Mr. Mowry [fol. 169] was with our Teamster men. Mr. Mowry was in there quite often; but I don't recall any specific conversation.

The Court: Directly or over the telephone?

A. It could have been either way, it could have been either way.

The Court: That will be all.

Mr. Hafer: So that the record is clear, we have a standing objection and move that the testimony as to the conversation between this witness and Mr. Lidster be stricken as hearsay, No. 1, and No. 2, no proper foundation has been laid with respect to the authority of Mr. Lidster to speak on the union's behalf or bind us.

Mr. Stauffer: Mr. Lidster, we heartily agree, is not the agent of the defendant, but he is an employee of one of our customers whom the agent of the defendant did encourage.

The result of that encouragement was that the employee went to his employer,—

The Court: The motion will be overruled.

Thereupon, the Plaintiff called as a witness, Mr. JAMES SCHOEN, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. James Schoen.

Q. Your address?

A. 4329 Inverdale, Toledo.

[fol. 170] Q. What is your occupation or business?

A. Paving contractor.

Q. For whom do you work?

A. Schoen Paving, Inc., and there is also another company, C. A. Schoen, Inc.

Q. Are you an officer in those two companies?

A. Yes, both.

Q. What is your office?

A. I am treasurer in both.

Q. Did you have the same offices throughout the year 1956?

A. I did.

Q. Where is your company located?

A. 310 South Westwood, Toledo.

Q. What is the business of your company?

A. Paving contractor.

Q. You said there are two companies. Please give us the business of each.

A. C. A. Schoen, Inc., manufactures paving materials and sells to Schoen Paving, Inc., and Schoen Paving is the paving contractor.

Q. Both of those companies are located at the same property, is that not true?

A. Yes, sir.

Q. At the Westwood address?

A. Yes.

Q. What raw materials were you using in 1956?

A. In the manufacture of asphalt we used sand, stone, and liquid asphalt primarily.

Q. Who were some of the suppliers of your sand in 1956?

A. That was all supplied by Lester Morton Trucking Company.

Q. Where are they located?

A. In Tiffin, Ohio.

[fol. 171] Q. And it was located there in 1956?

A. Yes.

Q. Did you learn of any labor difficulty that Mr. Morton was having in 1956?

A. I did.

Q. About when did you learn of it?

A. It was on a Monday morning. I think it was August 20, 1956.

Q. How did you learn of it?

A. I was on the job and I was informed of it on our mobile telephone in my automobile that there was some difficulty back at the plant.

Q. Where were you at the time, in the City of Toledo?

A. Yes; close by, with a few miles.

Q. But away from the office?

A. Yes.

Q. What happened?

A. They called and said that there was some kind of trouble at the plant.

Q. Who called you?

A. Our clerk in the office.

Q. What did you do?

A. I returned to the plant immediately.

Q. How long did it take you to get there?

A. Ten minutes; maybe, something in that order.

Q. Did you see anything unusual when you got there?

A. Yes. It was very evident that there was a strike of some kind.

Q. Tell us what you saw, please.

A. Well, I saw a sign saying "Strike."

Q. Tell us exactly what the sign said?

A. As far as I can remember, I think it said "Morton—Strike."

Q. Where was the sign?

A. Stuck in the ground by the fence at the gate, the front gate to our yards.

[fol. 172] Q. How many signs did you see?

A. I am not sure. I would expect two. I mean this is a long time ago, but I am not real sure.

Q. But you certainly saw at least one such sign?

A. Yes, at least; no question about that.

Q. Did you see any people about the sign or signs?

A. Yes, there were people around.

Q. Where were they in relation to your fence and gate?

A. Well, some standing outside the premises and there were others inside.

Q. About how many people did you see out at your plant that day?

A. Including the drivers of the trucks there must have been ten or thereabouts.

Q. Exclusive of the drivers of trucks how many did you see out there, Mr. Schoen?

A. I would say about six.

Q. What were those six men doing?

A. Well, they represented the strikers.

Q. What were they actually doing?

Mr. Hafer: Objection, Your Honor, and I move that the testimony be stricken. There is no showing that this witness has knowledge of who they represented, and I object to the lack of foundation laid.

By Mr. Stauffer:

Q. What did you see them doing, Mr. Schoen?

A. Well, just standing around, as a matter of fact,

Q. You mentioned truck drivers. What truckdrivers do you refer to?

Mr. Hafer: We move that this all be stricken, your Honor. There is no identification of these persons.

Mr. Stauffer: We will tie it up. I want to go through this step by step.

By Mr. Stauffer:

Q. What did you do next?

A. Well, I went into the office and found out what the problem was about.

[fol. 173] Q. Before you went into the office did you see these trucks you mentioned?

A. Yes. The trucks, Morton's trucks, were inside the yards and hadn't been unloaded or dumped.

Q. How many trucks did you see there?

A. I believe there were three.

Q. How did you know they were Morton's trucks?

A. They were identified. He had been hauling for us for years.

Q. Did he have his name on the trucks?

A. I am sure he does, yes.

Q. Where were those trucks parked?

A. They were inside the yards and parked about the yards away from where they would have been had they been ready to dump. They were not posed ready for dumping.

Q. They were still loaded? Or were they still loaded, Mr. Schoen?

A. Still loaded.

Q. What did you do then?

A. When my office informed me what the problem was I went outside and talked to the people who were there and was informed we could not accept this material, that there was a strike.

Q. Who did you talk to outside?

A. One of the gentlemen there. I don't know him, by name and I never knew him before. The one I do know,— did you have a question?

Q. Who did you know?

A. Ed Sullenger.

Q. Who is he?

A. He had,—I should say Ed was a business representative for the Teamsters as far as I know.

Q. What Teamsters local?

A. Local 20, Toledo.

[fol. 174] Q. How did you know that?

A. Well, I had had several conversations with Ed where he represented the Teamsters in the past.

Q. Over what period of time had you had these conversations?

A. You mean having to do with this item?

Q. No. You testified you knew him over a period of time.

A. Yes. I have known Ed for five or six years.

Q. Now, how did you get to know him?

A. He had contacted us as a representative of the Teamsters.

Q. Very well. Do you have any employees that belong to that union?

A. Yes.

Q. Did you have employees who belonged to that union in 1956?

A. Yes.

Q. What union or local did they belong to?

A. Local 20 of the Teamsters and the Operating Engineers, laborers.

Q. Did Mr. Sullenger ever contact you about the business of your employees?

A. Yes, he did. We have a state-wide agreement with the Teamsters and we have been contacted about that in the past.

Q. By Mr. Sullenger?

A. Yes.

Q. Was Teamster Local 20 a party to that agreement or contract?

A. Yes, they were.

Q. And Mr. Sullenger contacted you from time to time about that contract?

A. Yes.

[fol. 175] Q. And about other union matters?

A. Yes.

Q. When you went out and talked to him on this particular you are talking about what was the substance of your conversation with him?

Mr. Hafer: I object to this testimony having to do with conversations with Mr. Sullenger, between Mr. Sullenger and this witness. He is a management representative and the statute proscribes only the inducement of employees to engage in a concerted refusal to work. It does not proscribe the coercion of employers, does not now and never did, and if we are overruled on this objection we ask for a continuing objection to this line of questioning.

Mr. Stauffer: Of course, we do contend that this Court may consider elements of this total activity.

The Court: The objection will be overruled.

Mr. Hafer: May we have a continuing objection, your Honor?

The Court: You may have it.

Mr. Stauffer: What is the last question?

*(Thereupon, the last question was read by the Reporter.)

A. Well, it is difficult to try to bring it back after so many years, but the sum and substance of it was that we should not and could not receive this material because it was strike-bound.

Q. Anything said at that time?

A. Well,—

Q. (Interposing) Did you have any discussion about or with respect to the men that were standing there at the gate?

Mr. Hafer: Objection. I object to that question as leading. I might also point out that we have had to repeatedly object to leading questions throughout the trial of this case.

[fol. 176] The Court: Put another question to the witness.

By Mr. Stauffer:

Q. Did you discuss anything else with Mr. Sullenger?

A: Well, I don't know how to answer that because I don't know,—

Q. (Interposing) The question is, did you discuss anything else with him?

A. I am sure we must have because we had several minutes of conversation there.

Q. Did you discuss anything else that you can now recall?

A. Let me think for a moment, will you?

Q. Surely,

A. We made an arrangement or agreed to an arrangement whereby we would leave the trucks in the yards loaded, not unloaded, and that I would agree that we would not unload them until such time as it was arranged between the parties concerned that they could be unloaded or until we had some sort of legal evidence that we could or could not unload that was agreed on by all parties concerned.

Q. Why did you make that arrangement?

Mr. Hafer: Objection. That calls for speculation and a conclusion or conclusions from the witness. He is entitled to answer only as to conversations under the Court's ruling, not why he had them and draw conclusions from them.

The Court: The objection will be overruled. He may answer.

A. Of course, it is evident that we needed sand to conduct our business and that was our only source at the time. Of course, I didn't want to have those trucks out there forever and I wanted to arrange some conclusion to the problem.

Q. And so what happened then?

[fol. 177] A. Within the next day or two.—

Q. (Interposing) Excuse me. Did anything else happen that day? Specifically, were the trucks unloaded that day?

A. No, they were not unloaded that day.

Q. What happened to the trucks that day, and what about the drivers?

A. The drivers of those trucks were returned to Tiffin. I assume, by their employer, Mr. Morton, and that is all I saw of them there that day.

Q. Were those trucks ever unloaded?

A. Yes, they were unloaded when we finally got a Court Order which, as I interpreted it, allowed us to,—or allowed Morton's men to unload and continue to haul, as a matter of fact.—

Q. Did you get a Court Order?

A. Yes, I did.

Q. You received a copy of a Court Order?

A. Yes. I believe I have one still.

Q. Did you go to court to get a Court Order yourself?

A. No, I did not.

Q. Did you have any further conversations with Mr. Sullenger about the Morton strike after that day?

A. Yes, I did.

Q. How many conversations did you have with Mr. Sullenger?

A. I would say about two.

Q. Tell us about the first one of those conversations; where did it take place?

A. At our office. I believe all of them were there. He called me once by telephone and wanted to come out and see me, and another time he came out. He tried to persuade us not to use Morton's sand.

Q. I would like to inquire about the first time he came to your office following the day the trucks remained unloaded for a time.

[fol. 178] What was the substance of your conversation with Mr. Sullenger at that time, Mr. Schoen?

A. Primarily to tell us we shouldn't be using it, that we shouldn't have accepted it, that it was struck—or strike-bound material, and according to our agreement with them he said that we shouldn't use it, and of course I imagine at the time I pointed out that our agreement did not call—or actually did provide material whether or not it was union or non-union in that agreement.

Q. Who was the agreement with that you just referred to?

A. The agreement between the Teamsters and The Ohio Contractors' Association, Labor Relations Division.

Q. About how many days did this conversation take place after the incident of the trucks not being dumped?

A. I would say within a week.

Q. How many days after that was it that you had your next conversation with Mr. Sullenger?

A. After the initial strike, you mean, or the initial approach?

Q. No. The question was, how many days after this conversation about which you testified last, how many more days was it before you talked with Mr. Sullenger again?

A. I believe that all the conversations took place within a week's time or maybe ten days.

Q. Where did that conversation take place?

A. At our office.

Q. What was the substance of that conversation?

A. They all took the line to try to persuade us not to use the sand.

Q. Did you make any arrangement with Mr. Sullenger?

A. No. I might say that I did, of course, tell him that the reason I was, was because of the Court Order. I don't believe he ever gave me any kind of an argument about [fol. 179] that. I mean the Court Order was in existence and we continued to use the sand, to receive it.

Q. Did he say anything about the Court Order?

A. He hadn't been aware of the fact that there was a Court Order, I know, until I produced it.

Q. When did you produce it for Mr. Sullenger?

A. The first time he came to see me after I received the Court Order, which I believe would be the first day I started to receive the sand again, the day we dumped the trucks.

Q. The latest of the conversations you talked about with Mr. Sullenger was on the day following your receipt of the Court Order or just about that time?

A. Right.

Q. Was your plant continuing to produce asphalt, and so forth, during this week or ten days following the strike?

A. There was a period of time from the 20th—can I refer to my books, please?

Q. Sure.

A. The gray book on top is what I'll need (indicating). I don't think I will need the other one. We produced a limited amount of material on the 20th and we didn't produce any more until the 28th, and at this point I don't know why we didn't, whether it was because it was involved with the strike or whether it was for some other reason, but we didn't produce any material between the 20th and the 28.

Q. During the month following August 29th—or August 20th; Mr. Schoen, from whom did you get your sand?

A. We continued to purchase it from Morton.

Q. Did you purchase any sand from anyone else?

A. I believe we did, but I couldn't find it in our records. There are a lot of files I went through. I don't find any evidence of it here except for the fact that there was materials registered as received that were not invoiced from [fol. 180] Morton. I did for a while get some from another source, but I can't find that source now.

Mr. Hafer: We object to that testimony. The records are the best evidence. We ask that that be stricken, your Honor. In the event we are overruled, we ask for a continuing objection to this line of questioning; this testimony.

Mr. Stauffer: I was about to suggest that we would stipulate that we expect to show no damages on the part of the Schoen Asphalt Paving Company.

Mr. Hafer: We will accept the stipulation.

Mr. Stauffer: That is, no damages showing loss of work at Schoen.

A. I didn't know this this morning. I assumed that everything would balance and when they didn't is the first I was aware of this.

The Court: What do you mean when you say that you produced no material between the 20th and the 28th?

A. We manufactured no material at the asphalt plant.

The Court: But you can't now determine why that was?

A. That's right, sir, I can't. I would like to refer to one more thing: nor did we receive any sand between the 22nd and the 29th, the 22nd being the day we discharged the trucks. I believe it stopped on the 20th.

Mr. Hafer: Then under these circumstances, this being a damage case, your Honor, we move that all testimony in the record relating to events and conversations at or with Schoen representatives be stricken from the record, because we can be held liable under any theory only for those things which are illegal, and No. 2, which have caused financial injury provable by a plaintiff.

We have a stipulation in the record that they will prove no damages with respect to Schoen Asphalt Paving Company. In view of that admission, we move that all testi-

mony in the record concerning such conversations with our agents and such representatives be stricken.

[fol. 181] Mr. Stauffer: As the Court knows, the Court can consider the total activity of the union in this strike. The Court is well aware of the cases that we have cited, to the effect that under certain circumstances we may recover all of our damages as a result of unlawful activity.

The Court: I will overrule the motion.

Mr. Stauffer: I have nothing further at this time, your Honor.

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Cross examination.

By Mr. Hafer:

Q. On the occasion of your first conversation with Mr. Ed Sullenger I believe you testified that it occurred at the premises of Schoen Asphalt Paving Company?

A. That's right, Inc.

Q. Inc. Was the conversation carried on inside your office?

A. I could only guess; I would expect not.

Q. Do you have any recollection of where, physically speaking, the conversation took place?

A. My recollection would be that it was outside of the office, but within our premises.

Q. Who besides yourself and Mr. Sullenger were present at the time of the conversation?

A. Well, there was another representative of the Teamsters there.

Q. How do you know he was a representative of the Teamsters?

A. He identified himself as such.

Q. What did he say?

A. Well, I am sure I really don't know.

Q. Do you know what his name was?

A. I believe it was Evans.

Q. Do you have any recollection at this time that the man said he was Evans?

A. The name came to mind; why, I am not sure.

[fol. 182] Q. Do you know Mr. Evans?

A. I am not sure, no. This is a long time to remember back.

Q. I understand. Your recollection is that there was a man,—maybe a Mr. Evans,—and Mr. Sullenger and yourself present at this conversation?

A. Yes.

Q. Was anyone else present at that conversation?

A. I would expect that,—

Q. (Interposing) Please, only what you can recall.

A. I am sure there were others.

Q. Do you recall who they were?

A. Not by name.

Q. What was the substance of your conversation as well as you can recall with Mr. Sullenger?

A. That we should not receive the material, should not accept it, being that it was struck material. That's the sum and substance of it.

Q. All that you can recall of it?

A. Yes.

Q. When did Mr. Morton show up on the day you were called back by telephone?

A. I can't recall exactly when he showed up, and I can't recall whether he was there when I got there or not.

Q. At any time during the course of your conversation with Mr. Sullenger did Mr. Morton appear on the premises?

A. Mr. Morton appeared on the premises that day. He took his men back; of that I am sure, but what time he came there I can't recall.

Q. You testified on direct examination that by agreement of all parties trucks would be left on your property, that Morton's trucks would be left on your property loaded, until a Court Order was produced or until the parties agreed otherwise, is that correct?

[fol. 183] A. That's right.

Q. Did Mr. Morton, yourself and Mr. Sullenger reach this agreement that day?

A. Yes.

Q. So that it was an agreement between the three of you?

A. That's right.

Q. And you entered into this agreement at the time because Mr. Sullenger insisted that you should not receive the struck goods?

A. That's right.

Q. That was the reason, because he came to you and said you should not, right?

A. That is correct.

Q. You had two conversations with Mr. Sullenger within about a ten-day period, is that right?

A. That's right.

Q. Give us a date, if you will, or give it us as closely as you can, of the first conversation; that is, the one in which you, Mr. Morton and Mr. Sullenger agreed to leave the trucks on the Schoen premises?

A. The one was the 22nd.

Q. That was the conversation, the first conversation?

A. I cannot be sure of that. I knew I had one on the 22nd because that is the day, apparently, that we discharged the material.

Q. August 22, 1956?

A. That's right, that is the date we discharged the material. He wanted to know why I did it when we agreed we wouldn't, and that is when I told him about the Court Order and I produced it.

Q. The first conversation following the one in which you and Mr. Morton and Mr. Sullenger agreed to leave Morton's trucks on the Schoen premises occurred within a few days? [fol. 184] A. Yes.

Q. Now, at the time of that agreement who was present besides yourself and Mr. Sullenger?

A. I don't believe anybody else.

Q. Where did this conversation occur; that is, the middle conversation, the second of the three conversations; where did it occur?

A. In my office.

Q. Within a few days after that there was a third conversation between yourself and Mr. Sullenger, right?

A. Yes.

Q. Where did that conversation occur?

A. In my office.

Q. Who besides yourself and Mr. Sullenger was present?

A. No one that I recall. This was a long time ago.

Q. I understand. You are an officer of The Schoen Asphalt Paving Company, the treasurer I believe you testified, is that not correct?

A. That's right, Inc.

Q. Do you have active charge over the management of that business, Mr. Schoen?

A. I do.

Q. Do you have active charge over the top-level supervision of employees of that business?

A. I do.

Q. Do you have duties in connection with hiring and firing for that company?

A. Yes.

Q. You make decisions in this area?

A. Yes.

Q. Are you the ultimate decision in this area?

A. Ask my brothers. I make the top-level decisions, yes, we all do.

Q. All right. That is sufficient. Mr. Sullenger apparently [fol. 185] was unsuccessful in persuading you to quit doing business with Mr. Morton in the second and third conversations, was he not?

A. Yes, he was.

Q. At the first conversation he had some success, but that was result of an agreement between you, he and Mr. Morton?

A. That's right.

Q. It is my understanding of the record in this case that you testified that you had no recollection and no way of ascertaining from your records why there was a cessation of operations at Schoen's between August 20, 1956 and August 28, 1956, is that correct?

A. Not exactly. I don't recall saying that I couldn't ascertain it in some way, but I have no recollection of it at this time.

Mr. Hafer: Thank you. That's all I have.

Redirect examination.

By Mr. Stauffer:

Q. Do you expect during the noon hour that you might be able to establish why this break in production occurred?

A. I hardly think so. I might. I can try, but I don't know.

Q. What is your best recollection presently as to why it occurred, Mr. Schoen?

Mr. Hafer: Objection. He is attempting to impeach his own witness.

The Court: He has been very definite on that point, that he does not recall.

Mr. Stauffer: Very well, your Honor. We would like the opportunity to question him again after the lunch hour.

The Court: Are you finished with the witness now?

[fol. 186] Mr. Stauffer: Yes, sir.

The Court: That will be all.

Thereupon, the Plaintiff called as a witness, Mr. WILLIAM H. HEIM, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name and address, please.

A. William H. Heim, 450 Riverside Drive, Tiffin, Ohio.

Q. What is your occupation?

A. I am Seneca County Engineer.

Q. What was your work throughout 1956?

A. I was Seneca County Engineer.

Q. Is it part of the duties of the County Engineer to maintain the county roads?

A. That is his duty.

Q. Does the County of Seneca own all of its own trucks to do this type of work?

A. Seneca County owns a fleet of trucks, but we contract for the hauling on certain projects.

Q. Did you have any road improvement projects under way in August of 1956?

A. We did.

Q. Had the county contracted out a part of that work?

A. We contracted out the hauling of the stone for the contractor.

Q. How many projects are you speaking of?

A. I am speaking of just one contract, the hauling and furnishing of stone for the drag treatment and the surface treatment on hardtop roads in Seneca County.

[fol. 187] Q. And the County of Seneca was one party to that contract?

A. They were.

Q. Who was the other party to that contract?

A. Lester Morton Trucking Company.

Q. Of Tiffin?

A. Of Tiffin.

Q. State what that contract required Morton to do.

Mr. Hafer: Objection. That would not be the best evidence.

The Court: Yes. You may produce the contract.

By Mr. Stauffer:

Q. Would you produce the contract, please?

A. This is for the year 1956. (Producing same.)

Q. I hand you what has been marked for identification Plaintiff's Exhibit No. 3, Mr. Heim, and ask you what it is?

A. It is a copy of the contract made between Lester Morton and the County Commissioners of Seneca County.

Q. Is that the contract about which you have been testifying?

A. It is.

Q. You were the County Engineer when that contract was entered into, were you?

A. I was.

Q. What does that contract require, or what did that contract require Morton to do?

A. To furnish and haul to the site of the project the necessary stone for the execution of the job.

Mr. Hafer: I object to that and move that that testimony be stricken. The contract speaks for itself.

The Court: Overruled.

Q. Did Mr. Morton in fact perform all the work that was required of him? I mean required of him under that contract.

A. He did up to a certain date.

[fol. 188] Q. About what date was that, if you know?

A. About August 17th, I believe.

Q. Of what year?

A. Of 1956.

Q. Do you know of your own knowledge why he did not finish that work?

A. We were advised that a strike had been declared by the Teamster Union and we stopped the work then as far as Mr. Morton was concerned.

Q. You stopped the work?

A. I was the one that stopped it.

Q. How did you learn of the strike?

A. That is about five years ago and it is rather hazy, but I believe I can follow the sequence of events. I was advised by my road superintendent that there were no trucks on the job and that Mr. Morton had a strike. I can't give it to you verbatim, but I immediately told him to get our own trucks ready to do it, to do the hauling, because we could not stop the operation of the job.

Q. I want to inquire how you learned of the strike.

A. I first learned of it from my road superintendent.

Q. How else did you learn of the strike, if you did?

A. Well, it was general knowledge after awhile.

Q. Did you learn of it from someone else?

A. I believe,—I am more than certain that Mr. Evans some time after that,—probably a couple days,—came to my office and advised me that he would like to make my acquaintance as the County Engineer and,—

Mr. Hafer: (Interposing) Excuse me. We object at this time on the grounds of supervisory status. He is an elected

official and he is a representative of municipal government. The United States Supreme Court has ruled in the Dorr County case that the doctrine of pre-emption applies with respect to alleged boycott activities. The Taft-Hartley Act is clear that we must induce employees, as I said before, [fol: 189] and this was an elected official of a municipal government, not an employee within the meaning of the statute. It includes supervisors and all persons employed by a government body.

In the event our objection is overruled, we then ask for a continuing objection to this line of inquiry.

Mr. Stauffer: It is, of course, not disputed that Mr. Heim is not an employee. He is a supervisor. We are contending that this was a part of the overall conduct and it is unlawful under state law, this approach to a customer of ours through a supervisory employee.

The Court: The objection will be overruled. Proceed.

Mr. Hafer: Do we have a continuing objection?

The Court: You may have it, yes.

By Mr. Stauffer:

Q. Mr. Heim, I believe you were testifying about your conversation with Mr. Evans, is that not correct?

A. I think it was several days after that that Mr. Evans came to my office and he said he wished to meet the County Engineer, and then during the course of the conversation he asked me if I had been advised of the strike declared at Morton's, and I said at that time that I heard it, and that was the gist of the conversation. I don't believe he was in my office more than five minutes or ten minutes. He had some other gentleman with him, but I don't remember who he was.

Q. Do you see that Mr. Evans in the courtroom here today?

A. I believe that is him over at the end of the table and to the left.

Mr. Stauffer: Let the record show that the witness designated Mr. Lawrence Evans who has previously testified in this case.

By Mr. Stauffer:

Q. When was this conversation with Mr. Evans with [fol. 190] respect to the cessation of Morton's doing work for the county on this particular contract?

A. As I remember it, it was several days after.

Q. Now, have you made a computation from the records which you have with you as to the amount that the County of Seneca would have paid Morton under the contract which is Plaintiff's Exhibit 3 if Morton had completed that contract?

A. I have a copy of the amount that the,—

Q. (Interposing) The question is, have you made such a computation from such records?

A. Yes, I have made such computation.

Q. What is the amount that Morton would have so received?

A. \$3778.53.

Mr. Hafer: We object on the ground that this testimony is a summary conclusion. We do not have the best evidence in the record.

In the event that our object is overruled, we ask for a continuing objection on this ground.

The Court: Do you have your records available in case counsel wants them for cross-examination?

A. Yes.

The Court: Very well. Objection overruled.

Mr. Stauffer: You may cross-examine.

Cross examination.

By Mr. Hafer:

Q. Mr. Heim, what does the figure \$3778, forgetting the pennies,—what does that figure represent?

A. It represents the actual cost of the hauling and not the stone as it was included in the original contract.

Q. That remained to be done?

A. Yes.

[fol. 191] Q. All right. Did you pay an excise tax?

A. No.

Q. As I understand your testimony, you first learned of the strike against Mr. Morton from your project engineer?

A. The road superintendent.

Q. Excuse me, your road superintendent. As I understand you further, as soon as you learned of this from your road superintendent you immediately made arrangements to obtain trucks elsewhere to finish the work?

A. That is true.

Q. And then several days later Mr. Evans contacted you and told you that Mr. Morton was on strike, is that correct?

A. That was part of his conversation.

Q. Now, in the days intervening between your road superintendent telling you of the strike and your conversation with Mr. Evans, Mr. Heim, had you obtained substitute trucking services?

A. Yes. We used our own fleet of trucks, the county's own fleet of trucks.

Q. So that you finished the job you were on with your own or the county's own trucks?

A. With the county's own trucks, yes.

Q. So that you had already made the decision and put the decision into effect of using your own trucks before Mr. Evans ever talked to you, hadn't you?

A. Yes, sir.

Q. You are an elected official of the county government of Seneca County, are you not?

A. I am.

Q. And in 1956 you were an elected official of the government, the county government of Seneca County, State of Ohio, were you not?

[fol. 192] A. I was.

Mr. Hafer: I have no further questions of the witness, your Honor.

Mr. Stauffer: Nothing further.

The Court: That will be all, Mr. Heim, at this time.

Mr. Stauffer: Perhaps we should introduce this Plaintiff's Exhibit 3 into evidence.

The Court: The computation?

Mr. Stauffer: The contract itself. We would like to substitute copies for the original, your Honor, if we may.

The Court: Without objection it will be admitted.

Mr. Hafer: So that I may understand the posture of the record at this time with respect to Seneca County, may we have a statement from plaintiff's counsel with respect to the amount of damages he contends he is entitled to, assuming the Court finds liability in connection with Seneca County?

Mr. Stauffer: You may have a statement to the effect that the amount testified to by this witness will be an element of our damages and about which the plaintiff will testify later.

Mr. Hafer: The figure of 3700, whatever it was, is that what we are talking about here?

Mr. Stauffer: That is correct.

The Court: We will recess at this point. Court will be in recess until 1:30 this afternoon.

[fol. 193]

Afternoon Session
Tuesday, April 25, 1961
1:30 o'clock P. M.

The Court: You may proceed.

Thereupon, the Plaintiff called as a witness, Mr. BRENNER H. LAUNDER, who, having been previously duly sworn by the clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Brenner H. Lauder.

Mr. Stauffer: I would like to introduce at this time, your Honor, Mr. George Strassner of the Toledo Bar, licensed to practice in this Court and a Certified Public Accountant. He may testify later.

The Court: Very well:

Q. State your name and address.

A. Brenner H. Launder, 1935 Heatherwood Drive, Toledo.

Q. What is your occupation?

A. General contracting.

Q. With what company are you associated?

A. Launder & Son.

Q. Is that business incorporated?

A. That's right.

Q. Are you an officer thereof?

A. Yes.

Q. What position or office do you hold?

A. Secretary.

Q. Were you with the same company throughout the year 1956?

[fol. 194] A. Yes.

Q. Did you hold the same office throughout the year 1956?

A. Yes.

Q. What type of contracting work does Launder & Son, Inc., do?

A. General contracting, but primarily building and paving state highways.

Q. You build highways?

A. That's right.

Q. Were you building a highway in the summer of 1956?

A. Yes.

Q. What highway was that?

A. It was Project No. 548 and No. 499. State Route 53, and also Route 20 at Fremont, Ohio.

Q. Was that commonly referred to as the bypass of Fremont?

A. Yes.

Q. Then Launder & Son had a contract with the State of Ohio?

A. Yes.

Q. Was there more than one contract pertaining to that particular bypass?

A. Yes.

Q. How many were there?

A. Two of them.

Q. Do you have them with you?

A. Yes.

Q. May I see them, please?

(Thereupon, the witness produced some documents.)

Q. Mr. Launder, you have handed me two folders. Do these two folders contain the contracts you have testified about?

A. Yes.

Q. I wonder if you would take out of these folders all [fol. 195] correspondence and other papers that are not part of the contracts.

A. There is some writing on the back end of this which is part of the contract. I had better leave that.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 4 and ask you what that is, Mr. Launder.

A. This is the contract for Project No. 548, a state route, I believe it was 20, the Sandusky Bypass.

Q. The Sandusky Bypass?

A. I mean the Fremont Bypass.

Q. Was Launder & Son a party to that contract?

A. They are the prime contractor.

Q. And therefore was a party to the contract?

A. Yes.

Q. Who was the other party to the contract?

A. The State of Ohio.

Q. What did this contract require you to do, require your company to do, Mr. Launder?

A. It was for,—

Mr. Hafer: (Interposing) Objection, your Honor.

Mr. Stauffer: Yes, I suppose it speaks for itself.

The Court: He may tell in general what the contract is for.

A. It is for paving, grading and the drainage and structures for the highway.

Q. When was this work to be performed?

A. It was for 1956 and 1957.

Q. Was your company working on this project under this contract in the summer of 1956?

A. Yes.

Q. Did your company do all the work required by the contract?

A. No.

Q. What kinds of work did your company subcontract?
[fol. 196] A. We subcontracted structures, part of the excavation, and most of the trucking on it.

Q. To whom did you contract the trucking that was subcontracted?

A. To the firm of Morton Trucking and to Bigelow Trucking.

Q. What part of the work did you subcontract to the Morton Company?

A. The hauling of the batches for the concrete.

Q. Was that The Lester Morton Trucking Company of Tiffin?

A. That's right.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 5, Mr. Launder, and ask you what that is?

A. This is a contract for Project No. 499, which is part of the Fremont Bypass.

Q. The parties to that contract are Launder & Son and the State of Ohio?

A. That's right.

Q. Were these two projects worked on simultaneously?

A. That's right.

Q. Were they in the same geographical area?

A. Yes.

Q. Did you perform all of the work or did your company perform all of the work called for under Plaintiff's Exhibit 5?

A. No.

Q. What part did you subcontract out?

A. The earth work, the trucking and the structures.

Q. To whom did you subcontract the trucking?

A. To Bigelow and to Morton.

Q. What part of the work was subcontracted to Morton Trucking?

[fol. 197] A. The hauling of the batches for the concrete.

Q. That was The Lester Morton Trucking Company of Tiffin, Ohio, again?

A. Yes.

Q. Explain briefly, please, the nature of the batching work that was subcontracted to Morton Trucking?

A. It was the hauling of batches which consisted of stone, sand and cement to the paver which was on the job and then dump it in the batch and return for more, return for another batch and bring it to the batching area again.

Q. How much of the batching under these two contracts was subcontracted to Morton?

A. All of it.

Q. What was your agreement with Mr. Morton?

A. The agreement with Mr. Morton was that we would pay him 75 cents per batch, the batches hauled on both projects.

Q. Look at Plaintiff's Exhibit 4 and the project referred to therein and tell us how many batches of concrete was required to be hauled under that contract, if you can, Mr. Launder?

A. I can't do that without figuring it out.

Q. Can you tell us how many square yards of concrete was required by that contract?

Mr. Hafer: We are talking about Exhibit 4, aren't we?
Mr. Stauffer: Yes.

A. It was 111,980 square yards.

Q. Have you made a computation as to how many cubic yards that would have been?

A. For this same one on Plaintiff's Exhibit 4?

Q. Yes.

A. No.

Q. Have you made the computation for the two contracts together?

[fol. 198] A. Yes.

Q. Then may I ask how many square yards were required by the contract which is marked Plaintiff's Exhibit

A. 51,267 square yards.

Q. Have you made a computation of the total square yards required by the two contracts?

A. Yes.

Q. What is that total, please?

A. The total of the two projects was 163,247 square yards.

Q. Have you made a computation of how many cubic yards that would be?

A. That would have been 40,812 cubic yards.

Q. What is the relationship between a cubic yard and a batch?

A. Each batch contains 1.38 cubic yards.

Q. Have you made a computation of how many batches were required by the two contracts, Plaintiff's Exhibits 4 and 5?

A. It would have been 29,574 batches.

Q. Do you have any records with you that would establish how many batches were hauled by Mr. Morton, the plaintiff in this case, under these two contracts?

A. Yes.

Q. May I see that, please?

(Thereupon, the witness produced some documents.)

(Said documents were then handed to Mr. Hafer and Mr. Gallon.)

Q. I will hand you what has been marked Plaintiff's Exhibit 6 and ask you what it is, Mr. Launder?

A. It is the vouchers, the cancelled checks, and an invoice from The Morton Trucking Company for the work performed on the two projects on Routes 20 and 53.

Q. And from Plaintiff's Exhibit 6 can you determine how many batches were hauled by Plaintiff Morton under these two contracts of yours with the State of Ohio?

A. Yes.

Q. What is that figure, please?

A. I would have to add them up to do it, though.

Q. Have you not made a computation of that?

A. No, all I have is the computation of the dollar value that we paid him.

Q. Would you add them up, please?

Mr. Hafer: While the witness is making his computations, your Honor, I would like to point out at least so far as my recollection goes we don't have any testimony establishing any liability with respect to Launder. We have had a Mr. Littrell on the stand and he was unable to identify the persons with whom he had conversations. At this time we have the cart before the horse when he computes damages. Mr. Littrell was the first witness, your Honor, today.

Mr. Stauffer: If the Court please, we do expect to get into the question of liability with this witness, but we do not believe that we are putting the cart before the horse, for the reason, again, that we do not need to separate liability from damages, that we must show unlawful activity during the strike, and if it is of sufficient character, and so forth, that we may recover for all of our damages. We will get to the question of liability with this witness.

The Court: Yes. Mr. Littrell failed to identify Mr. Evans as the caller.

By Mr. Stauffer:

Q. Have you made a computation of the number of batches hauled by the Plaintiff Morton?

Mr. Hafer: Excuse me. May we have a statement or ruling of the Court on this matter?

The Court: Counsel says that he expects to establish liability.

[fol. 200] Mr. Hafer: With this witness?

The Court: Yes.

Mr. Hafer: May we have a continuing objection then under Rule 9 (g)?

The Court: For what reason?

Mr. Hafer: Under Rule 9 (g) with reference to the sufficiency of complainant's Complaint.

The Court: Very well. You may have your objection.

By Mr. Stauffer:

Q. Have you made your computation of the number of batches hauled by Mr. Morton's trucks on these projects, Mr. Launder?

A. Yes, 4720 batches.

Q. How did you arrive at that?

A. From his invoice of 7/16-7/31, 3511 batches, and from the period of 8/1 to 8/22 it was 1209 batches. I believe that was all of them. I might clarify that. He hauled some more batches which we have no record of.

Q. Why have you no record of those?

A. It was during the period that he worked by the hour.

Q. Is there any way of determining how many batches that would have meant, or how many it would have included?

A. No.

Q. How much was he paid for hauling by the hour?

A. By the hour he was paid \$6.50 an hour.

Q. What was the total?

A. He worked 18 hours, for a total of \$234.00.

Q. Is there any record of what day or days those 18 hours of hauling done?

A. That was on 10/24 and 10/25.

Q. Of 196—or 1956?

A. Right.

Q. Whatever number of batches hauled by him, that you do not have a record of here; those batches were hauled in those 18 hours on those two days?

[fol. 201] A. Right.

Q. Why did Morton not finish the batching on that job?

Mr. Hafer: Objection. That calls for a conclusion from the witness.

The Court: He may answer if he knows.

A. The reason is the strike that was called against him in 1956.

Q. Did you have any discussions with anyone about that strike?

A. Yes.

Q. With whom?

A. I talked to Larry Evans about it.

Q. Who is Larry Evans, if you know?

A. He is the business agent for the Teamsters Union.

Q. How did you know he was the business agent for the Teamster Union?

A. Well, I have known Mr. Evans for quite a while. As long as I have known him he has been business agent for the union.

Q. Which union is that again?

A. The Teamster Union.

Q. Where is that union's office located?

A. Toledo, Ohio.

Q. How did you get together with Mr. Evans?

A. I called him.

Q. Why did you call Mr. Evans?

A. I called Mr. Evans to ask him if it would have been possible for us to use Morton's trucks unoperated and furnish the drivers ourselves.

Mr. Hafer: Objection to the question and the answer, your Honor, and I move that it be stricken on the ground that it is a conversation between an alleged agent of the union and a person of acknowledged managerial status. The inducement of such a person is not unlawful under Section 303 of the Taft-Hartley Act and cannot be made a [fol. 202] common law action. We therefore ask that the witness not be permitted to testify concerning the conversation.

If our objection is overruled, then we ask that we be given a continuing objection to this line of questioning.

The Court: The objection will be overruled. You may have a continuing objection.

Mr. Hafer: Thank you.

The Court: You say you called him?

A. Yes, sir.

The Court: He didn't call you?

A. No.

The Court: When did you call him?

A. It was August 11th.

Q. Do you recall where you phoned him?

A. No.

Q. Do you recall why you phoned him?

A. I called him to ask if we could lease Morton's trucks unoperated and furnish the operators ourselves, or the drivers ourselves for the trucks.

Q. Was Morton then working on the job?

A. Yes.

Q. Did you tell him you might like to do that?

A. Yes.

Q. Why was that?

A. So that we could keep on working without any interruptions due to the strike.

Q. What strike are you referring to?

A. The strike of the Teamsters against Morton Trucking Company.

Q. At the time you called him was there then a strike?

A. No, I don't believe so.

Q. What did Mr. Evans say to you?

A. He said that we couldn't use Morton's trucks if the strike was called in any form and indicated if we did we would have a picket line around our batch plant area.

[fol. 203] Q. What did he say?

Mr. Hafer: Objection to that.

The Court: Objection sustained. This was prior to the strike?

Mr. Stauffer: That is correct, your Honor.

The Court: In anticipation of a strike?

Mr. Stauffer: That is correct.

Q. What else did he say to you, if anything?

A. Nothing, to my knowledge. I can't remember any other parts of the conversation.

Q. This conversation was about the 11th of August?

A. Yes.

Q. You were then using Morton's trucks for batch work?

A. Yes.

Q. Did you continue to use Morton's trucks for batch work?

A. Yes.

Q. For the remainder of the job?

A. No.

Q. For how long did you use Morton's trucks then?

A. The last record of work that we have for Morton's trucks working by the batch was on August 22, 1956.

Q. Who did the batching after that?

A. Individuals, and a company of Launder & Son put their own trucks on.

Q. Why, if you know, did Morton do no batching after August 22nd?

A. The only I know of is that he was on strike at that time and he couldn't furnish trucks to us.

Q. Did you know that at that time?

A. I didn't understand the question.

Q. Could you tell me whether on August 22, 1956, you knew that Morton was being struck?

A. Yes.

[fol. 204] Q. Who gave you the order to stop Morton's trucks on your jobs, if you know?

A. I am not definite in my recollection who did.

Q. Who in your company would have the authority to do that?

A. It was either myself or our general superintendent that worked there.

Q. Who was your job superintendent or general superintendent?

A. Marv Lee.

Q. What do your records show as to whether Morton batched after August 22nd?

A. After August 22nd?

Q. Yes.

A. Just October 24th and 25th working by the hour.

Q. Those 18 hours that you referred to?

A. Right.

Q. Do your records show whether Morton did any batching on August 17, 1956?

A. No.

Q. They do not show that?

A. No, they don't show any trucking done by Morton on August 17th.

Q. Would your records show he had done any batching on August 17th if he had done any?

A. Yes.

Q. Do your records show whether he did any batching for you on August 20, 1956?

A. No, he didn't.

Q. He did not do any batching then?

A. That's right.

Q. Did Morton do any batching on August 21, 1956?

A. No. My records don't show that Morton did any work on August 21st.

Q. What do your records show as to whether Morton did any batching on August 22, 1956?

[fol. 205] A. On the 22nd he hauled just 12 batches.

Q. Do you have any explanation as to why batching was done on the 22nd but not on the previous two or three days?

A. Not any definite reason other than that we had information of the strike and Morton was off for a few days, and we replaced them with privately owned trucks during that period. We started replacing them on August 17th.

Q. Do you have any explanation as to why he happened to come back on the 22nd of August?

A. No, I don't recall the definite reason for him coming back on the 22nd.

[fol. 208] Thereupon, the Plaintiff called as a witness, Mr. ROBERT W. WILSON, JR., who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Robert W. Wilson, Jr.

Q. Your address is what?

A. 430 Jump Street, Bucyrus, Ohio.

Q. What is your business?

A. I am a stockholder in The Wilson Sand Company.

Q. Are you an officer of that company?

A. I am the treasurer.

Q. Were you such officer in that same company throughout the year 1956?

A. No.

Q. Were you connected with that company in 1956?

A. Yes.

Q. In what capacity?

A. Partner.

Q. Since 1956 the business has been incorporated, is that right?

A. That's right.

Q. Where is this place of business?

A. Rural Route 4, Upper Sandusky, Ohio.

Q. Was the location of that business the same in 1956?

A. Yes.

Q. What was the business of the partnership in 1956?

A. Excavating sand and gravel and selling it.

Q. The partnership owned a sand pit?

A. Right.

[fol. 209] Q. Who were some of the larger users of your sand in 1956?

A. The ready-mix concrete producers like Louis O'Connell in Tiffin, and Dorsey Construction in Findlay.

Q. Did you make any sales to any highway contractors in 1956?

A. One.

Q. Who was that?

A. V. Holderman & Sons.

Q. Where is that company from?

A. Columbus.

Q. What was that company doing in 1956?

A. They had a job at Findlay, Ohio.

Q. What kind of a job was that?

A. Highway construction.

Q. You had an agreement with The V. N. Holderman & Sons Company in 1956, is that right?

A. Right.

Q. What did that agreement require of you?

A. We agreed to deliver approximately 35,000 tons of sand to their job.

Q. What were you to be paid for that sand?

A. 240 delivered on the job.

Q. Delivered where?

A. In Findlay, Ohio.

Q. Within the corporation limits of Findlay?

A. I believe so. I am not sure. It is the western edge of town, I believe.

Q. Did your partnership in fact deliver or cause to be delivered all of the sand required of you by that agreement?

A. That's right.

Q. Did your partnership deliver the sand itself?

A. We either hauled it ourselves or hired it hauled.

[fol. 210] Q. Prior to doing anything under that agreement what arrangements, if any, did you make about hauling that sand?

A. We contacted The Lester Morton Company.

Q. Where is the Lester Morton Company located?

A. Tiffin, Ohio.

Q. Who did you contact there?

A. I didn't contact anybody there, but my brother did. He was a partner with me in this business. I assume he talked to Lester Morton.

Q. Do you have any personal knowledge of any agreement made with Lester Morton?

A. Only that there was a verbal agreement that he was to haul sand.

Mr. Hafer: Before the witness is permitted to continue in that area, your Honor, we are here faced with the testimony of a witness with respect to which there is not one iota of testimony by any witness in this case on the issue of liability here, and it seems to me we shouldn't take up an hour or so on damages until we find out what the liability is so that the Court can rule on the question.

Mr. Stauffer: We do not expect to use this witness or any witness having any connection with The Wilson Sand & Gravel Company on the element of liability. This is on the element of damages alone, and under the authorities cited in our trial brief we believe we may do so.

The Court: How do you expect to connect it up with any damages if no liability is established?

Mr. Stauffer: It is our position, your Honor, that if we establish that the defendant engaged in unlawful activity, then—

The Court: (Interposing) But you say you have no evidence of unlawful activity in connection with this particular job, is that correct? That is what I gathered. [fol. 211] Mr. Stauffer: That is correct, but we are saying it is our position that if we establish that the defendant conducted unlawful strike activity, if we establish that through other witnesses, activity that occurred elsewhere, then the law does not require us to segregate the damages that flowed directly from the things that the union did unlawfully.

However, the Plaintiff Morton will testify on the question of liability and on the point as to why he was unable to perform under the agreement with Wilson Sand & Gravel Company, but we will not use any witnesses directly from the Wilson Company on that point.

The Court: And it is not the strike against Morton that you are complaining of, per se?

Mr. Stauffer: I don't understand the question.

The Court: It is not the strike against Morton that you claim is the basic reason for the damages; it is other unlawful activities, is that it?

Mr. Stauffer: Perhaps your Honor is using the word "strike" in a narrow sense.

The Court: I am.

Mr. Stauffer: What do you mean by "strike," your Honor?

The Court: The striking of the Morton concern.

Mr. Stauffer: All of the activity in toto here?

The Court: I didn't say all the activity. You are including other activities, I assume.

Mr. Stauffer: Yes, your Honor.

The Court: Then you are claiming that all of the damages flowing from that activity may be grouped together.

Mr. Stauffer: Yes, sir.

Mr. Hafer: With the Court's permission I would like to speak directly to that point. Let us assume for a moment that of Mr. Morton's forty drivers twenty-five of those drivers decided to quit working or put economic pressure [fol. 212] on the plaintiff. Let us assume further as a consequence of that he couldn't fulfill Mr. Wilson's contract, or the contract he had with The Wilson Company. Under

those circumstances, I respectfully submit to the Court under the law of Ohio and under the First and Fourteenth Amendments to the Constitution under the doctrine of pre-emption this is lawful primary conduct and it was considered such even in 1930.

It is fantastic that we should be held for damages because he could not fulfill his commitments with The Wilson Company. If the record showed that he was picketed out there, and so on, that would be an entirely different matter.

The Court: It seems to me that the damages that you are about to set up here in the case of Wilson, that the liability therefor is too remote, too vague.

Here you have Mr. Morton's place struck and picketing by his own employees, and as a result thereof I think you expect to show, have shown or will expect to show, that he was unable to fulfill his contract with Wilson.

How can you connect it up with a situation like that, where there are no illegal acts performed that have any direct connection with his contract with Wilson or his inability to fulfill it?

I think it is so remote that it requires some mental gymnastics to connect the matter up.

You may proceed with it, subject to striking it after the Court has had an opportunity to examine the citations on both sides.

Mr. Hafer: May we have for the record a continuing objection to the testimony of this witness?

The Court: Yes, you may.

[fol. 213] By Mr. Stauffer:

Q. What was the arrangement between your partnership in 1956 and the Morton Company with respect to this sand to be hauled to the V. N. Holderman Company job?

A. Morton was supposed to have the first chance to haul it.

Q. Did he get that chance?

A. Yes.

[fol. 215]

Cross examination.

By Mr. Hafer:

(On voir dire.)

[fol. 225]

By Mr. Hafer:

Q. When did you learn, Mr. Wilson, that Mr. Morton's trucks were not going to be available to you to fulfill the Holderman commitment; do you recall that?

A. I don't recall exactly, no, sir.

Q. How did you gain knowledge of the fact that Mr. Morton would not be around with his trucks to help you fulfill this Holderman agreement?

A. I believe my brother called Mr. Morton and asked him if he would ready to haul more.

Q. Did you personally overhear the conversation?

A. No, I did not.

Q. So that your knowledge of Mr. Morton's unavailability came from your brother?

A. Yes.

Q. What is your brother's first name?

A. Kent.

Q. I will ask you only one more question and then let you go Mr. Wilson. Is your sole knowledge of the content of the agreement between your company and Mr. Morton's company based on your conversation with your brother?

A. That's right.

Q. Then your sole knowledge of the reason Mr. Morton did not reappear to finish his work for you is also based upon your conversation with your brother?

A. No. I had heard that there was a strike in progress.

[fol. 226] Q. From whom did you hear about this strike?

A. Other truckdrivers.

Q. Either from these other truckdrivers or from your brother you heard about it?

A. That's right.

Morning Session,
Wednesday, April 26, 1961,
9:30 o'clock A. M.

The Court: You may proceed.

Thereupon, the Plaintiff, called as a witness, Mr. KENT WILSON, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Py:

Q. Would you state your name for the record, please?

A. Kent Wilson.

Q. How old are you, sir?

A. Thirty-seven.

Q. Are you the brother of Robert Wilson?

A. Robert Wilson, Jr.

Q. In 1956 were you a partner in the Wilson Sand Company?

A. That is correct.

Q. You are now incorporated, are you not?

A. That's right.

Q. Now, Mr. Wilson, calling your attention to 1956 did you have a contract, with the Holderman & Sons Company, Inc. to haul or furnish sand to them?

[fol. 227] A. I did.

Q. Do you know when that purchase order was received from Holderman, approximately?

A. April of 1956.

Q. How much or in what quantity did that purchase order require you to deliver?

A. Approximately 35,000 tons.

Q. Do you know how many tons were delivered pursuant to that purchase order?

A. Somewhere around 33,000 tons.

Q. When you received that order from Holderman, what did you do with reference to The Lester Morton Trucking Company?

A. I picked up the purchase order in Columbus in Holderman's office and within the next few days I contacted Mr. Morton and asked him if he was interested in hauling the job for me.

Q. By "hauling the job" do you mean the entire job?

A. That's right.

Q. And you contacted him where?

A. At his garage in Tiffin.

Q. Did he accept the offer to haul all of the sand?

A. Yes.

Q. Did you agree on a price that you would pay him per ton?

A. Yes, 1.10 a ton.

Q. Pursuant to that contract did he start hauling sand for you?

A. A few days after I started on the job, yes.

Q. And when was that, if you know?

A. In July or August of 1956.

Q. How long did he haul at that time? Do you know how many days he hauled?

A. I don't know how many days.

Q. What was the purpose of his starting to haul in July or August?

[fol. 228] A. To build up a stockpile before they started on the job.

Q. And that is customary in the paving business, is it?

A. Yes.

Q. You build up a stockpile first?

A. Yes.

Q. And your purchase order from Holderman required that, didn't it?

A. Yes.

Q. And after the stockpile is filled you still keep running trucks after they start paving?

A. Yes, and they try to maintain their stockpile.

Q. Is there a limit to the amount that you can stockpile on these jobs?

A. Yes. He told me he was going to try to stockpile about 10,000 ton, I think, but he run out of room before he had that much stockpiled.

Q. But he ran out of room. You mean Holderman ran out of room before you reached the 10,000 ton mark?

A. Yes. That was at the crossover on Route 224 in Findlay.

Q. Do you know about how many tons he did get on the stockpile, or do you know how many tons completed the stockpile?

A. I would guess roughly somewhere around 7000 ton.

Q. 7000 tons. So that would have left approximately 25,000 tons to be hauled if 32,000 is what was left or was the total job?

A. That's right.

Q. And if the total job took 33,000, as you say, and there was 7000 there, then that would have left about 26,000?

A. Of course, at that time I had no idea whether it was going to run 35,000 or not.

Q. Did Lester Morton haul any more after the initial stockpiling operation had been completed?

[fol. 229] A. I don't believe so.

Q. Do you know why he didn't haul pursuant to his contract?

A. Mr. Morton come down and he told me, he says he had no drivers, and he said that he was sorry that he left me holding the bag because the purchase order didn't have anything on it about that he was going to haul.

Q. Did he give you a reason why he didn't have drivers, Mr. Wilson?

A. He said that he was having labor trouble.

Q. Mr. Wilson, did you use some of your own trucks and perhaps other truckers when you initially started to build up this stockpile?

A. That's right.

Q. What was the reason for that?

A. When I talked to Mr. Morton in April I told him approximately when the job was going to start and I had one day's notice to start hauling.

Q. And who would you receive that order from?

A. Mr. Plummer told me to start hauling tomorrow.

Q. He is an agent for Holderman?

A. Yes. His name is on the purchase order there, I think.

Q. When you received that one-day notice, then tell the Court what happened?

A. I called Mr. Morton and I says, "Holderman is ready to start stockpiling tomorrow", and he says, "as quickly as I have trucks available I will start hauling". When I got the purchase order from Mr. Plummer I had no definite date to start and I couldn't blame Mr. Morton for not being there right away. It is not like calling a fire truck and being there right away at a moment's notice.

Q. Then you started to use some of your own trucks and other trucks to start the stockpiling?

A. Yes.

[fol. 230] Q. Subsequent to that date did Mr. Morton start with his trucks?

A. Yes, he did.

Q. After he started with his trucks did you continue to use your own trucks?

A. No.

Q. Did you have any other outside truckers then?

A. No. I think I had a few that hauled a few days after that, but I think we should have the records here. There must have been fifty different truckers that hauled on that job.

Q. Do you have a date in mind when the stockpile was created or when you finished stockpiling initially?

A. I have no idea of what that would be.

Q. But after the stockpiling was completed, thereafter Morton had the contract to haul the balance?

A. That's right.

Mr. Py: No further questions.

Cross examination.

By Mr. Gallon:

Q. Did you bring with you today the records of the company in regard to this job which you have described?

A. I think you had them here yesterday.

Q. Are they still in court?

A. My brother is here somewhere with the records.

Q. He is here with the records someplace?

A. Yes.

Mr. Gallon: Could we excuse the witness for a moment?

The Court: Do you have those records?

Mr. Stauffer: We don't have the records right here.

Mr. Gallon: I believe they are in the jury room.

The Court: You might see if you can get them, Mr. Bailiff, from the brother of the witness.

By Mr. Gallon:

Q. Do you have the records in front of you now, Mr. Wilson?

[fol. 231] A. I have checks where I paid truckers and my copy of Holderman's bill.

Q. Calling your attention first to the testimony which you gave on direct examination, did I understand that you first discovered that Mr. Morton would not be able to complete his contract from Mr. Morton himself, is that it?

A. That's right.

Q. And I think you have testified that Mr. Morton told you he had no drivers?

A. Yes, sir.

Q. Then did he tell you why he had no drivers?

A. He said he was having labor trouble.

Q. Had you heard about this so-called labor trouble from any other source prior to Mr. Morton telling you that?

A. When they was hauling some of his drivers mentioned the fact, the ones that were hauling on the job already.

Q. What did they say?

A. That some of them was there working and some of them was not working.

Q. Did you hear from any other source prior to Mr. Morton coming over to talk to you about the fact that he had labor trouble?

A. No.

Q. In respect to your stockpile you have testified that it was supposed to be a 10,000 ton stockpile but you had orders to stop at 7000 tons, is that correct?

A. When the pile got full I think it was the superintendent for Holderman that shut it off. His job was to make sure that there was materials there and when he got his pile full he shut me off.

Q. In regard to being shut off from this stockpiling, Mr. Wilson, you were given an order not to deliver stone, is that not correct?

A. Yes.

[fol. 232] Q. Now, did that happen before you heard from Mr. Morton that he had no more drivers, at the same time or thereafter?

A. He was still hauling on the job when we got shut off, I believe.

Q. And when you say "shut off" you mean when the stockpile had run out of room?

A. Yes.

Q. After Mr. Morton had come in to talk to you in regard to running out of drivers did you hear about his labor troubles from anyone else?

A. (Witness nods head.)

Mr. Hafer: Let the record show that the answer was indicated as negative by the witness shaking his head.

Mr. Gallon: Your Honor, at this time I would like to move that the testimony of this witness be stricken because the plaintiff has not adduced any testimony from him indicating under any theory liability as to the defendants in this action. It would appear that the plaintiff himself went over to the witness's premises and withdrew his services.

The Court: . . . I will overrule the motion to strike. It may stand. You may proceed.

Mr. Gallon: We have no further questions, your Honor.

The Court: Anything further of this witness?

Mr. Gallon: One moment, your Honor.

(Thereupon, Mr. Gallon conferred with co-counsel.)

By Mr. Gallon:

Q. Mr. Wilson, you have with you now the records indicating the suppliers or the drivers or the companies which transported this stone from your quarry to this job site, is that right?

A. Yes.

Q. Could you pull out those checks and the vouchers indicating the dates involved? Mr. Wilson, in regard to [fol. 233] the use of Morton's men and other drivers I think you indicated that Mr. Morton came to you and reported that he had no more drivers about the same time you said you were shut off from the job, is that right?

A. I don't remember exactly.

Q. You say you don't remember when that stockpile was built up, is that right?

A. That I couldn't tell you definitely, no. Probably the records would show definitely if you want me to go through them here.

Q. Do you know whether you were shut off from this stockpiling in August?

A. I would say it was in August.

Q. Do you know whether it was the last week of August?

A. In the first part of August.

Q. In the first part of August. And at the time you were shut off from the stockpile do you know whether or not you still had other drivers besides Morton's drivers?

A. I think probably there was a few.

Q. Will you please look at your records for the first week of August to see what companies you used to ship or transport this stone? I withdraw that question, Mr. Wilson.

Let me ask you this question: You made a statement on direct examination that you were using a few other drivers during this period of time?

A. That's right.

Q. Did you make an independent examination of your records that you have in front of you before making that statement on direct examination?

A. No. I haven't looked at this. This is the first time I have looked at these in five years.

Q. If your brother testified from these records that you have in front of you that during this period of time, in the beginning of August, 1956, that Morton then had about [fol. 234] fifty per cent of the transportation of this material and he testified from those records, would you say that is substantially accurate?

Mr. Py: I object. He is asking the witness for a conclusion based upon someone else's testimony.

A. I didn't hear the testimony.

The Court: This is cross-examination.

Mr. Gallon: We are just inquiring as to this witness's understanding of this.

A. I didn't hear the testimony. If my brother said something, it is correct.

Q. Do you have any information, from your recollection, Mr. Wilson, that would vary from that which he testified to from the records?

A. This might not answer your question, but my brother mainly stays in the office most of the time and I am on the road and on the job all the time, and as far as billing and that stuff, that is not in my department.

Q. So, I will restate my question to you then. If your brother testified from these records that about fifty per cent of these transportation trips, this hauling, were done by Lester Morton during this period of time and he is in charge of the books, you would think that that would be an accurate statement?

A. That's right.

Mr. Gallon: No further questions.

The Court: Anything further of the witness?

Mr. Py: Yes, your Honor.

Redirect examination.

By Mr. Py:

Q. Mr. Wilson, since you were the outside man of the partnership in 1956 you had a better understanding of,—

Mr. Gallon: I object.

[fol. 235] Mr. Py: This is redirect.

Mr. Gallon: Go ahead.

Q. Mr. Wilson you were the outside man, were you not?

A. Correct.

Q. You were at the stockpile site how often, would you say?

A. At least twice a day.

Q. Did you observe any union activity at the job site while the stockpiling was initially being carried out?

A. I did.

Q. Would you tell the Court what that consisted of?

A. May we go back to Mr. Plummer again. He would call me up and say, "I'm not getting sand fast enough." I would go to the job and the superintendent, his job was to maintain a stockpile and he had bulldozer and crane operators on the job and he had to pay them for eight hours a day there and if they didn't have anything to do they were still getting paid for eight hours a day, and then anyway I asked this job superintendent on the job and Mr. Plummer what the trouble was and I was told that some of the union organizers were buttonholing the men on the job.

Mr. Gallon: I object to this.

The Court: Not what somebody told you; did you see it?

A. I saw it.

The Court: The objection will be overruled.

Q. How did that interfere with,—

Mr. Hafer: (Interposing) I object. Let us not have any more leading questions.

The Court: Yes, do not lead the witness. Let him testify.

Q. Did it interfere with the stockpiling?

A. Yes, it did. I told Mr.—, the superintendent at the site, that I didn't appreciate Mr. Plummer calling me up and I said,—

[fol. 236] Mr. Hafer: (Interposing) I object again to this.

The Court: Yes, not what you said to anybody, but what you did, what you saw and did.

A. That's right, I saw, and the statement I am making—I told this job superintendent that they shouldn't be on the job site, that they can have the road by—they can have the road but not the job site.

Q. Was that discontinued then after this conversation you had?

A. That was approximately the time when they got the stockpile built up.

Q. Completed.

A. Completed.

Mr. Py: That's all I have.

Mr. Hafer: I move that the testimony with respect to the union organizers buttonholing people be stricken, your Honor, since there is no identification in the record as to what union it was.

The Court: Yes, there is no indication as to who the union was.

Mr. Py: Can I inquire as to that, your Honor?

The Court. You may proceed.

By Mr. Py: . .

Q. Do you know what union organizers they were, Mr. Wilson?

A. They didn't talk to me and it would be hearsay, but our own personal drivers come back and told us they were Teamsters.

Mr. Hafer: Objection, your Honor, and I move that it be stricken.

The Court: That may go out.

Q. From your observations, Mr. Wilson, do you know what percentage of the stockpile was hauled by Morton and what was hauled by others including yourself?

A. I was just looking here. Here is the date of August 6th here. There was several other truckers besides Mr. [fol. 237] Morton. I will read those. A lot of those small truckers were hauling.

Mr. Hafer: Counsel is attempting to impeach his own witness. The first Mr. Wilson who testified here testified as to precisely the amounts hauled in particular periods. It is broken down daily. Any testimony in the same area from this witness can only impeach what his brother said.

The Court: I will hear what he has to say.

A. As I say, I am looking at this page. Mr. Morton's trucks was hauling better than twice the size loads as the other trucks were hauling, eight and sixteen tons. He didn't have as many trucks, but it was 8 and 16.5, and Mr. Morton's trucks 21 tons, better than twice the loads of some of the other trucks. There was a lot of these smaller trucks on.

Q. So that in number there were a greater number of trucks of others, but on the tonnage Morton was hauling,—

Mr. Hafer: Objection. He is calling for a conclusion from this witness.

The Court: Objection sustained. Counsel is leading the witness and calling for a conclusion on his part.

A. Now,—

Mr. Hafer: (Interposing) There is no question before you.

By Mr. Py:

Q. Do you know how many days it took to stockpile; do you have any recollection of that, Mr. Wilson?

Mr. Gallon: I believe the witness has testified that he does not know the exact dates of that.

The Court: Let the witness answer.

A. I would say approximately two weeks, and that is a guess.

Mr. Hafer: We move that his guess be stricken.

[fol. 238] Q. That is your best judgment?

The Court: Overruled.

A. Yes. This is five years ago.

Mr. Py: Nothing further from this witness, your Honor.
The Court: Anything further?

Mr. Hafer: We have a motion before the Court strike his testimony as to the union organizers at the site, I believe.

The Court: I sustained that objection because there was no identification as to what union was involved.

Mr. Hafer: Then there is nothing further with respect to this witness.

[fol. 239] Thereupon, the Plaintiff, Mr. LESTER MORTON, was himself called as a witness and, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. State your name, please.

A. Lester Morton.

Q. Are you the plaintiff in this action?

A. Yes, I am.

Q. What is your address?

A. 632 Market Street, Tiffin, Ohio.

Q. What is your business?

A. The trucking business.

Q. How long have you been in that business?

A. I have been in the trucking business since 1924.

Q. How many dump trucks did you operate in 1950?

A. Approximately 57.

Q. Did the Defendant Teamsters Local 20 conduct a strike against you in 1956?

A. Yes.

Q. In what month?

A. In August.

Q. What was the first day of that strike, if you recall?

A. August 17th.

Q. The day before the strike and the period just preceding the strike were your trucks working?

A. Yes, they were.

Q. Where were some of the places and some of the jobs that they were working at and on?

A. We was working for O'Connell's, The O'Connell Coal Company.

Q. Where is that?

[fol. 240] A. That is at Tiffin, Ohio. We was working for Launder & Son of Toledo, too.

Q. Where was that work being done?

A. That was being done at Fremont on Route 20, the bypass.

Q. Were you working any place else, Mr. Morton?

A. At Schoen Asphalt Paving at Toledo, Ohio Engineering.

The Court: Ohio Engineering?

A. Yes, sir, Wilson Sand & Gravel, A. J. Baltes, and we was working for Seneca County. There was a number of them, that I can't recall just who they were now. There was somewhere around ten or twelve different places. Then there was Ohio Engineering at Findlay.

Q. Just prior to the first day of the strike what work were you doing at O'Connell's?

A. We was hauling material from Carey and Wilson Sand & Gravel into their yards at Tiffin.

Q. State whether you had any agreement or arrangement with The O'Connell Company?

A. Yes, sir, I did.

Q. ~~What was that arrangement or agreement?~~

A. That was,—which way do you mean?

Q. What was your agreement; what had you agreed to do?

A. We agreed to haul the stone and sand, all the materials into their yards from different quarries at all times whenever it was needed.

Q. After the strike did you continue to haul all that you were required to haul to O'Connell's?

A. No, we didn't.

Mr. Hafer: Objection. I believe this testimony is for the purpose of impeaching, impeachment of their own witness.

The Court: You are speaking now of O'Connell?

[fol. 241] Mr. Hafer: Yes. I am speaking of the testimony of O'Connell's representative, Mr. Magers.

Mr. Stauffer: This is merely background leading up to the amount of damages that were sustained here, your Honor.

The Court: Very well.

Mr. Hafer: May we have a continuing objection on this O'Connell matter, your Honor?

The Court: You may.

By Mr. Stauffer:

Q. Does your company retain an accountant on a regular basis?

A. Yes, we do.

Q. Who is that?

A. That is George Strassner.

Q. For what period of time have you retained him?

A. We have retained him for the last ten years, approximately, I would say.

Q. Have you conferred with him during the course of this trial?

A. Yes.

Q. Did you go over with him this agreement you had with The O'Connell Company?

A. Yes, sir.

Q. Did you and he together prepare a memorandum on that subject?

A. Yes, we did.

Mr. Hafer: We don't have a record of an Exhibit 9.

The Clerk: Exhibit 8 is the invoice of Morton to Wilson Sand dated 9/1/56.

Q. I hand you what has been marked for identification Plaintiff's Exhibit 9 and ask you, Mr. Morton, whether this is a copy of the memorandum that was prepared by you and Mr. Strassner?

A. Yes, sir.

[fol. 252] The Court: Was that your agreement with Wilson?

A. The agreement to haul 35,000 ton, yes, that's right.

The Court: Overruled.

Q. Was that an exact or an approximate figure?

A. Approximately; it could have been more or less.

Q. How could it have been more or less?

A. If the job would take more, of course, it would be more than that. I mean you can't figure it exactly until the job is done.

Q. When was your agreement with the Wilson Company made?

A. It was along about the middle of April.

Q. Of what year?

A. 1956.

Q. Did you do any hauling under this agreement?

A. Yes, we did. We hauled some.

Q. Did anyone else do any hauling of this sand?

A. Yes. There was other trucks on there.

[fol. 253] Q. How much did you haul, approximately?

A. We hauled right around 26 or 2700 ton, if I remember right; approximately that.

Q. Why, if you know, did other truckers do hauling on that job for Wilson?

A. Well, I saw some of them hauling.

Q. Why was that, if you know?

A. It is because he called up one night and wanted trucks the next morning and of course we didn't have any available right away, and I guess he did have to go out and hire a bunch of other trucks.

Mr. Hafer: Objection. We move that his guesses be stricken from the record.

The Court: That has been testified to by Mr. Wilson.

By Mr. Stauffer:

Q. Yes. What was your situation after the stockpile was created or completed? What was your situation as to the number of trucks you were then operating altogether?

A. Was that before or after the strike?

Q. It was after the stockpile was created.

A. We had about 57 trucks available.

Q. How many trucks would it have taken to do the work as required under your agreement with Wilson?

A. About approximately 20.

Q. Would that many trucks have been available for the Wilson job from your company?

A. Yes, they would have been.

Q. Why were they not available?

A. Because we was on strike.

Q. How many, therefore, were actually available following the strike? How many drivers did you have to work on the job?

A. Well, maybe we had about,—I would like to get that question again.

Q. Did any of your drivers work on this job during the strike?

[fol. 254] A. No, they didn't.

Q. Why not?

A. Because we was struck.

Q. Is it correct that the stockpile was created before the strike began?

A. Yes, that's right.

Q. Is it correct that you did know,—

Mr. Hafer: (Interposing) He is continually leading the witness. Objection.

The Court: Yes. Let the witness testify.

Q. How many tons, approximately, remained to be hauled under your Wilson agreement after the stockpile was created?

A. Approximately 24,163.

Q. What was the average tonnage left to be hauled at the time the strike began?

A. At the time the strike began how much tonnage,—

Q. (Interposing) How much tonnage remained to be hauled about the time the strike began?

A. About 24,163.

Q. Under your agreement with Wilson what part of that were you to haul?

A. I was supposed to haul all of it.

[fol. 256] Q. What was your agreement with Launder & Son?

A. To haul all the batches on the two projects.

Q. Where were those projects?

A. On the Fremont Bypass, Route 20 and Route 53.

Q. Did you complete your contract with Launder & Son?

A. No.

Q. And why not?

A. Because we was struck.

Q. Did you complete your contract with Seneca County?

A. No, I did not.

Q. Why not?

A. Because we was struck.

Q. Did you complete your contract with The O'Connell Company?

A. No, we did not.

Q. Why not?

A. Because we was struck.

Q. How long did the strike last?

A. It lasted from August 17th to about October 5th, I believe.

Q. Did you meet with the union officials during the strike?

A. Yes, we did.

Q. For what purpose?

A. Negotiating a contract.

[fol. 257] Q. During the course of the strike did you ever go to The France Stone Company?

A. Yes, I did.

Q. Did you see anything unusual on any of your trips there?

A. Yes, I did.

Q. What was that?

A. I saw a strike sign out at the entrance to the stone quarry.

Q. What did you do?

A. I got out of the car. I had my camera with me and I took a picture.

(Thereupon, the said photograph was handed to Mr. Hafer by Mr. Stauffer.)

By Mr. Stauffer:

Q. I hand you what has been marked Plaintiff's Exhibit 13, Mr. Morton, and ask you what it is.

A. That is the picture that I took.

Q. Do you know about when you took it?

A. I don't recall. It was next,—it was right around the 23rd or 24th, it was.

Q. Was it a few weeks after the strike began or a week?

A. It was the next week following the strike in August.

Q. Of what year?

A. 1956.

Q. There are two cars parked there. What road are they parked parallel with?

A. That is parallel with Route 19. That is a county road.

Q. Of what county?

A. A Seneca County road.

Q. What is the road that leaves that road at right angles in the photograph?

A. That is the roadway that goes into the quarry.

Q. Do you know whether that is a public or a private road?

[fol. 258] A. Yes, a private road.

Q. Do you know whose road it is?

A. The France Quarry's.

The Court: You may suspend at that point for fifteen minutes.

Mr. Stauffer: I would like to ask him one more question and then I will dismiss him.

The Court: Proceed.

By Mr. Stauffer:

Q. Can you identify the person in that picture?

A. Yes; that is Dallas Nye.

Q. Who is Dallas Nye?

A. He was one of the drivers.

Q. One of what drivers?

A. Morton's; or one of my drivers.

Q. Was he on strike?

A. Yes, he was.

Q. How did he spell his last name?

A. N-y-e, I believe.

Q. His first name is Dallas, D-a-l-l-a-s?

A. Yes.

Q. Who was the general contractor that was building the bypass off Route 25 at Findlay to whom you were to haul sand?

(Thereupon, the last question was read to the witness by the Reporter.)

A. V. N. Holderman & Son.

The Court: What was your former testimony, that it was Launder?

A. I think I said Launder. I got the two jobs mixed up.

Q. In 1956, Mr. Morton, when repairs were required to be made to your trucks who made them?

A. Our mechanics in the garage made them.

[fol. 259] Q. How many mechanics did you have working in the garage in August, September and October of 1956?

A. Well, we had six to eight mechanics.

Q. At that time?

A. Yes.

Q. Did they work throughout those months?

A. Yes, they did.

Mr. Stauffer: At this time we would like to move that Plaintiff's Exhibits 9, 10, 11, 12 and 13 be admitted.

Mr. Hafer: I will have to look at them. My recollection is not too clear. Exhibits 9 and 10 are the schedules of O'Connell.

The Court: That's right.

Mr. Hafer: And Seneca County.

The Court: That's right.

Mr. Hafer: Those two exhibits are in the stipulation entered into and I am willing to let them in.

The Court: How many do you have altogether, five or six?

Mr. Stauffer: There are six exhibits.

The Court: What is your Exhibit 13?

Mr. Stauffer: Exhibit 13 is the photograph, your Honor.
The Court: I see. Was that the last one?

Mr. Stauffer: Yes, sir.

[fol. 260] Cross examination.

By Mr. Hafer:

Mr. Hafer: At this time, your Honor, we have a stipulation to propose, and it is as follows:

It is hereby stipulated by and between Plaintiff and the Defendants in this proceeding, through their respective counsel, that the business of Lester Morton Trucking Company and the businesses of the alleged neutral or secondary [fol. 261] employers, identified as customers of Morton, all affect interstate commerce within the meaning of the National Labor Relations Act, that is, the business of the customers affect such interstate commerce.

The Court: Very well.

Mr. Stauffer: That will be agreeable, providing it reads "customers" or "suppliers."

Mr. Hafer: Of course.

By Mr. Hafer:

Q. How many trucks were you operating, Mr. Morton, between August 1st and August 15th, 1956?

A. Approximately 57.

[fol. 275] By Mr. Hafer:

Q. How many meetings, Mr. Morton, do you recall attending during the strike with the union for the purpose of reaching a settlement of that strike?

A. Well, I can't say exactly how many meetings there was. It is my recollection there was—we met at least once a week.

Q. There were a large number of meetings, as you recall it, is that correct?

A. There was maybe six or eight, or there might have been ten.

Q. And those meetings ultimately resulted in a contract, did they not?

A. That's right.

Q. About when was that, do you recall?

A. It was on a Friday afternoon. I don't recall the date, but I think it is the 5th of October.

Q. Did the strike end just about the time the contract was signed, Mr. Morton?

[fol. 276] A. Yes.

Q. I show you what has been marked Defendants' Exhibit D, Mr. Morton. I wish—

Mr. Stauffer: We will object to this line of questioning, if the Court please, if it has to do with anything except impeachment of this witness on the ground that it is immaterial.

The Court: I don't know what counsel is getting at.

Mr. Stauffer: We have not gone into this area on direct.

The Court: What area is it you are getting into now?

Mr. Stauffer: I have been presented with a copy of a union agreement purportedly—I believe correctly representing a copy of the contract between the plaintiff and the defendant. It is dated October 5, 1956. We are not complaining about anything that happened on or after October 5, 1956. I don't think it is an issue in this case.

Mr. Hafer: Are you finished?

Mr. Stauffer: Yes.

The Court: What is your purpose?

Mr. Hafer: The purpose is primarily to show the Court what this thing was all about, this controversy, and to show the Court how it ended. This is relevant, if nothing else, as going to the issue of punitive damages.

I propose to show through this witness and our own that we had a legitimate labor activity seeking to get a labor contract and not engaged in a conspiracy to destroy his business. I want to show what happened in our negotiations and how we settled them.

On the question as to whether or not this is within the scope of the direct examination, your Honor, this witness on direct examination testified to several negotiating meetings during the course of this strike. This is the last one

of a series of meetings and I think it is in the area opened by counsel for the plaintiff.

[fol. 277] The Court: I can see where the inquiry along this line might have some bearing on their claim for punitive damages. For that purpose you may go into it.

Mr. Hafer: That is the principal purpose I had in mind, your Honor.

The Court: Very well.

By Mr. Hafer:

Q. I show you what has been marked Defendants' Exhibit D and ask you whether or not a copy of the collective bargaining agreement which you entered into with Teamsters Local 20 is contained therein? Is that a copy of that collective bargaining agreement?

A. Without going through it—

Q. (Interposing) Take as much time as you wish to go over it, Mr. Morton.

A. I would have to have my contract. I would say it was the same one.

Q. I want you to be sure this is the same one, Mr. Morton?

A. I would have to get my contract.

Q. Take whatever time you want to do it.

Mr. Stauffer: Is this a signed original?

Mr. Hafer: It is a photostatic copy of the signed original.

The Court: Was that a part of Defendants' Exhibit B, the contract?

Mr. Hafer: No, sir.

The Court: I didn't think so. My record indicates that Defendants' Exhibit B is the group of strike ballots, the secret ballot that was taken.

Mr. Hafer: Before the strike.

The Court: Yes.

Mr. Hafer: Perhaps I did not accentuate it or enunciate it clearly enough, your Honor. This is "D", not "B".

The Court: Very well.

By Mr. Hafer:

Q. Have you had an opportunity to thoroughly examine the document, Mr. Morton?

[fol. 278] A. Not thoroughly.

Q. Are you satisfied that this is a copy of your agreement of October 5, 1956, with the Teamsters?

A. Not unless I had my copy and went through it, I would say.

Mr. Hafer: Do we have a stipulation or—

Mr. Stauffer: (Interposing) I don't want to hold this thing up.

(Thereupon, there was a short discussion off the record between counsel for the parties.)

Mr. Hafer: Counsel for plaintiff and the defense offer the following stipulation.

It is agreed between the parties that Defendants' Exhibit D is a true and accurate photostatic copy of the original signed agreement entered into in the year 1956 between Morton Trucking Company and Teamsters Local 20.

The defense reserves to itself the right to make a word for word examination of it and should it appear that there are any errors or inconsistencies between the original contained in the plaintiff's file that the plaintiff reserves the right to withdraw from the stipulation. Is that satisfactory?

Mr. Stauffer: That is agreeable, your Honor.

Mr. Hafer: Then we offer the document in evidence at this time.

The Court: It will be admitted.

By Mr. Hafer:

Q. During your negotiating meetings with Teamsters Local 20 during the strike you consistently refused to enter into a contract with that union, did you not, until such time as it organized your competitors?

A. During the whole agreement or during the whole—

Q. (Interposing) During the period of negotiations which occurred during the strike isn't it a fact that during that

strike you repeatedly insisted that they organize your competitors and then you would sign with them?
[fol. 279] A. During the strike?

Q. Yes, during the strike.

A. That is not true.

Q. You never took that position at all then?

A. I did before the strike.

Q. Before the strike?

A. That's right.

Q. But not after the strike started?

A. No.

Q. You never took that position after the strike started?

A. I don't recall taking that position after the strike started.

Q. With anyone?

A. With anyone? Who do you mean?

Q. Strikers, Teamster Local 20 officers, or the Local 20 business agents.

A. No.

Q. Not during the strike?

A. Not during the strike because I knew there had to be a contract.

Q. The strike was in progress prior to August 31, 1956, was it not?

A. When was that?

A. August 31, 1956?

Q. Yes.

A. That's right.

Q. And it was in progress subsequent to August 31, 1956, was it not?

Q. Subsequent to, after.

A. After.

Q. On about August 31, 1956, you prepared a letter to all of your employees, did you not?

A. I don't recall of preparing a letter.

Q. Do you deny that?

A. I don't recall of preparing a letter.

[fol. 280] Q. I show you what has been marked Defendants' Exhibit E. I want you to read it over for a minute. Have you finished reading it, Mr. Morton?

A. Just a minute. I want to read this over again, your Honor.

Q. You read it over once, haven't you?

A. Yes.

Q. Do you want to read it again?

A. Yes.

Q. All right. You may read it a second time, Mr. Morton. Have you finished reading it, Mr. Morton?

A. Yes.

Q. At the top of Exhibit E appear the words in large print, "LESTER W. MORTON, HAULING CONTRACTOR, FINDLAY ROAD, TIFFIN, OHIO"; is that the letterhead of your company?

A. At the top, yes, sir.

Q. Then it says: "To all employees of Lester Morton Trucking Co.:", doesn't it?

A. Yes.

Q. And after several paragraphs it says, "Sincerely, Lester Morton," doesn't it?

A. Yes, sir.

Q. And a signature in ink over that?

A. Yes, sir.

Q. Is that your signature, Mr. Morton?

A. Yes, sir.

Q. Do you recall now, Mr. Morton, having a letter prepared over your signature and distributing it to your employees?

A. My counsel and I prepared that.

Q. But you signed it, did you not?

A. Yes.

Q. And then you distributed it to the employees of your company?

[fol. 281] A. Yes.

Q. To strikers and non-strikers?

A. Yes, sir.

Mr. Bafer: We offer it in evidence for impeachment purposes, your Honor.

The Court: Without objection it will be admitted.

[fol. 312] Thereupon, the Plaintiff called as a witness, Mr. RANSOM TALLBEE, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Stauffer:

Q. Would you state your name, please?

A. Ransom Tallbee.

Q. What is your residence? Where do you live?

A. Tiffin, Ohio.

Q. For whom do you presently work?

A. Lester Morton.

Q. Did you work for Lester Morton in 1956?

A. I did.

Q. Did you work for Mr. Morton during the strike in 1956?

A. No.

Q. State whether or not you appeared at Morton's garage property during the strike at all?

A. In front of the garage, yes.

Q. Why did you not go to work during the strike?

A. Well, there was two or three reasons.

Q. Tell us those, please.

A. Well, one was because,—well, I didn't want to have no trouble. If I had went in and went to work and went to hauling, why I would probably have trouble.

[fol. 313] Mr. Hafer: Objection and move that it be stricken as speculation by the witness.

The Court: Overruled. It may stand.

Q. Proceed to tell us why you did not go to work.

A. Well, one was because that they said if I went to work that all the guys working in there, they would have their union cards pulled and wouldn't get to work any more in Ohio.

Q. Who said that?

A. Lots of them said it, but one personally I know, Kennedy,—I believe his name is Kennedy,—he told me.

Q. Who is Kennedy?

A. Well, he is one of the union representatives, I guess. He was always — they took it in turns being over there with us.

Q. A representative of what kind of a union?

A. Teamsters.

Q. Where did that Teamsters Union have its office?

A. In Fremont.

Q. Did you ever go to that Fremont office?

A. Yes.

Q. To union meetings?

A. Yes.

Q. Would you have been able to belong to the Teamsters Union if your union card had been pulled?

Mr. Hafer: Objection. It calls for a conclusion from the witness.

A. I don't think so, but that is what they told us.

The Court: It may stand.

Q. They told you that you wouldn't be able to belong to the union?

A. Yes. They said we wouldn't be able to work anywhere in —

The Court: (Interposing.) Who told you that?

[fol. 314] A. Well, the guys that was there with us that come over and stayed with us, one of the union representatives.

Q. Can you name them?

A. Well, one of them was Kennedy, and I can't think of the other guy's name.

Q. Were there any other reasons why you did not go to work during the strike?

A. That is about all.

Q. State whether any trucks of Morton's left his garage during the strike?

A. They did.

Q. Did you see them?

A. Yeah.

Q. What happened about those trucks?

A. What happened about them?

Q. Yes.

A. I don't know what happened about them after they left out of my sight, but they was followed by some of the fellows.

Q. Followed by whom?

A. Well, there was Evans, the Combs, the two Combs boys, Marcum and Taylor. They usually went.

Q. Did that have anything to do with your not going to work?

Mr. Hafer: Objection. This is certainly leading.

The Court: Yes, it is leading.

Mr. Hafer: And it is impeaching his own witness because he has already asked him what all his reasons were for not going to work.

By Mr. Stauffer:

Q. What effect, if any, did that have upon your not going to work?

Mr. Hafer: Objection. He is impeaching his own witness. He has asked for a complete statement of his reasons and he has been given them. Now he is trying to go over it again.

[fol. 315] Mr. Stauffer: If the Court please, he testified that there were several reasons and he has given just one.

Mr. Hafer: He has given two and he said he had no others.

The Court: He said he had several reasons in the beginning. He has given reason one. That's all that I have heard.

Mr. Hafer: He has given two reasons, your Honor; "I didn't want no trouble", and 2, "I would have my card pulled," and he referred to a conversation with the man named Kennedy.

The Court: I included that all in reason one. He was discussing reason one when he made that statement.

Mr. Hafer: And then he was asked whether he had any others and he said no.

The Court: Put a question to the witness.

By Mr. Stauffer:

Q. What effect did Morton's trucks being followed by Combs and others have upon your not working, if any?

Mr. Hafer: Objection. It is leading and it is self-serving and an attempt to impeach his own witness.

The Court: He may answer.

A. Well, I didn't want to go in and take a truck out and be followed because that would end up in me maybe getting hurt and I didn't go for that kind of thing myself.

Mr. Stauffer: You may cross-examine.

Cross examination.

By Mr. Hafer:

Q. What do you mean "get hurt"?

A. What I mean?

Q. Yes.

A. What I said.

Q. You tell us what you meant by getting hurt. Who was hurt?

[fol. 316] A. No one was hurt as I know of.

Q. All right. That is precisely the point. Who else did you talk to other than Kennedy by name?

A. Like I said, I don't remember the other guy's name that was over there.

Q. All right. Now, what, precisely, did Kennedy say to you as well as you can recall it?

A. He said the guys that went in there to work, that was working through this strike, would have their card pulled.

Q. Did you have your card at that time, or did you have a card at that time?

A. Sure. I think I had a card then. I think I had.

Q. Did you attend the strike vote meeting?

A. I beg your pardon.

Q. Did you attend the strike vote meeting?

A. Yes.

Q. Did you vote?

A. Sure.

Q. Do you remember what that vote was?

A. I voted not to strike.

Q. I didn't ask what you voted. Do you remember what the result of the vote was?

A. Sure.

Q. It was to strike, wasn't it?

A. It was to strike.

Q. The majority of the people wanted to strike, didn't they?

A. That is what the vote was.

Q. Didn't you want a wage increase?

A. Sure.

Q. Did that have anything to do with your supporting the strike, the fact that you might get a wage increase if you went on strike?

A. That was the whole idea.

[fol. 317] Q. That was the whole idea of the strike, wasn't it?

A. That's right.

Q. Did you want a wage increase?

A. Why, sure.

Q. Did you support the strike because you wanted a wage increase?

A. Well, I didn't support it too much. I was mostly a bystander and the other guys talked it up, not me.

Q. Bean went to work, didn't he?

A. Who?

Q. Bean. Do you remember him, the foreman?

A. Yeah.

Q. He still works there?

A. Yeah.

Q. He worked all the time, didn't he?

A. He sure did.

Q. Did he get hurt?

A. That,—no, not as I know of.

Q. Did you see anybody get hurt on the picket line?

A. No.

Q. Did you see anybody get hurt while you were driving—or while they were driving a truck?

A. No.

Q. Then your notion about getting hurt is something in your own head, isn't it? It is not based on anything that happened on the picket line, is it?

A. It is based on a lot of talk.

Q. Based on a lot of talk by whom?

A. Well, all the guys.

Q. The fact is that no one was hurt on that picket line; isn't that the fact?

A. That's a fact.

Q. The fact is that none of the men that drove in and drove out of there during the strike were hurt; that's a fact, isn't it, so far as you know?

[fol. 318] A. As far as I know.

Q. Now, how many times did Evans follow a truck?

A. I didn't count them.

Q. More than twice?

A. I'd say so.

Q. Did you see any of those trucks come back?

A. Yeah.

Q. Were any of those trucks damaged?

A. Not as I know of.

Q. Were any of those drivers injured?

A. Not as I know of.

Q. The fact of the matter is that anybody that wanted to go in or out of those premises did so without anybody interfering with him in any physical manner, isn't that true?

A. Well, as far as I know it is. I never seen no trouble.

Mr. Hafer: Nothing further.

The Court: Anything further?

Mr. Stauffer: I think that's all, your Honor.

The Court: That's all.

Mr. Stauffer: I am afraid I said he was our last witness, but we would like to put on Mr. Strassner, our accountant, very briefly.

The Court: We will recess at this point. You may want to check on your accounting matters.

[fol. 345]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: There has been included in the motion a move to dismiss the Seneca County claim for the reason that they discontinued voluntarily their connection with the plaintiff and not through pressure and that they discontinued because of the primary strike. The witness who testified on the Seneca County question was the county engineer and I think he was the only one, was he not?

Mr. Stauffer: That is correct, your Honor.

The Court: William H. Heim, of Tiffin, Ohio, Seneca County Engineer, speaking of Mr. Morton, "He performed until August 17th and then we were advised by our road superintendent that Morton had a strike and then I stopped his work. Evans called at my office and asked me if I knew that a strike had been declared against Morton and I said that I did."

On cross-examination he said: "We had made the decision to discontinue with Morton several days before Evans visited."

Now, what is there in the record to hold Seneca County in this case?

[fol. 346] I think I have given in substance substantially the important testimony on that question.

Mr. Stauffer: My recollection with respect to the County Engineer's testimony is that the union agent who called Mr. Heim indicated that he wanted Heim's cooperation and Heim said in effect that he would have it. My notes show that Heim also testified that had it not been for the strike Morton would have done this work:

The Court: But am I correct in quoting him on cross-examination as having said, "We had made the decision to discontinue with Morton several days before Evans visited."

Mr. Stauffer: Yes, I think you are correct. I am sure he did say that, among other things.

The Court: If it was a voluntary discontinuance on his part, why should Seneca County be continued in this case, the Seneca County claim?

Mr. Stauffer: If the Court gives that part of his testimony the most weight, even after considering all of this testimony of Heim, then the plaintiff could only, as we do very strongly, fall back on the concept of the totality of the effort that certainly as a result of the strike we lost that job and we would not have lost it but for the strike.

Mr. Heim testified that he learned of the strike and if the Court believes that the decision to discontinue Morton was entirely voluntary on the part of the County Engineer, then nevertheless it is a part of our total damages flowing, we believe, from the total effort of the union.

The Court: I think in view of Mr. Heim's conclusion on cross-examination I would be inclined to sustain the motion as to his connection with this case, and I would be inclined to sustain the motion as to the claimed damages as to attorney fees.

[fol. 347] As to all other matters I would defer action on the motion.

You may proceed with the defense.

Mr. Hafer: I am not sure I understood the Court, that is, as to attorney fees and Seneca County:

The Court: They are stricken from further consideration.

Mr. Hafer: Thank you.

Mr. Stauffer: For the record, your Honor, we have an objection.

The Court: You may have your objection.

[fol. 357] Thereupon, the Defense called as a witness, LAWRENCE EVANS, who, having been previously duly sworn by the Clerk, testified further as follows:

Direct examination.

By Mr. Hafer:

Q. You have already testified in this case, have you not?

A. I have.

Q. Mr. Evans, you are an officer of the Teamsters Union, are you not?

A. I am.

Q. What is your address? First, what is your business address, Mr. Evans?

A. 435 South Hawley.

Q. And your home address?

A. 543 Clifton Boulevard, Toledo 7, Ohio.

Q. I show you what has been marked as Defendants' Exhibit M, Mr. Evans, and ask you to identify for the record that document, if you will, please.

A. This was a letter sent out to Mr. Lester Morton on July 18, 1956.

Q. By you?

A. Yes, sir.

Q. What circumstances prompted the sending of this letter?

A. To request a meeting to negotiate a contract to cover his employees working in his company.

Mr. Hafer: I might explain to the Court what we are going to do. What we propose to do through Mr. Evans is to fill in with a little more specificity the events leading up [fol. 358] to this strike so that your Honor will have it clearly in this record.

We move that Defense Exhibit M be received at this time also, your Honor.

Mr. Stauffer: No objection.

The Court: It will be admitted.

I believe you said, Mr. Evans, you are an officer of Local 20?

A. Yes, your Honor.

The Court: What office do you hold?

A. Trustee, sir.

By Mr. Hafer:

Q. I show you what has been marked as Defense Exhibit N and ask you to identify it for the record.

A. This is a letter from Mr. Morton's attorney advising that he represented the company.

Q. And asking for—or indicating there would be a meeting in the near future, is that right?

A. Yes.

Mr. Hafer: We move that Exhibit N be received in evidence.

Mr. Stauffer: No objection.

The Court: It will be admitted.

Mr. Hafer: Exhibit N is dated July 26, 1956, your Honor.

The Court: Very well. Proceed.

By Mr. Hafer:

Q. What happened next after receiving this letter in connection with the progress of either your negotiations or your meetings with the employees? What was the next concrete event after July 26th?

A. You mean the members' action or the company?

Q. Either one. What happened chronologically after receipt of Defense Exhibit N?

A. I believe there was a meeting held around the 8th of August, if I remember correctly, or somewhere around there.

[fol. 359] Q. Who attended?

A. Correction. Before that there was a meeting between this letter, the first letter, and the 18th; and the letter from the attorney, if my remembrance is right, I think we had a meeting in Fremont with Mr. Morton.

I believe this letter was sent to him on July 18th. If I remember correctly, along about July 23rd or 24th, somewhere in there, there was a meeting held in Fremont.

Q. This was a meeting between the company and union representatives?

A. Yes.

Q. What was the purpose of the meeting of the 23rd of July, 1956?

A. That was in reference to the letter sent out July 18th.

Q. And now you are talking about Defense Exhibit M?

A. Yes, sir.

Q. Who attended the meeting on July 23rd, Mr. Evans, to the best of your recollection?

A. Mr. Morton attended the meeting and myself, and I am pretty sure our attorney, Jack Gallon, attended that meeting on the 23rd.

Q. What was the purpose of the meeting?

A. To conclude agreement, to represent the people working for Mr. Morton.

Q. What position did Mr. Morton take at the meeting?

A. Well, offhand I couldn't tell you everything that went on, all the pros and cons; but I believe there was one thing that disturbed us all, that we must have or maintain 80 per cent of his customers or competitors that were working in that type of field, or the method of—well, sign the other fellow first and I will sign.

Now, there were six or eight operations similar to his in that territory. If I remember correctly, that is what came out of that meeting.

Q. Did you have any definite agreement come out of that meeting?

[fol. 360] A. No.

Q. After the meeting broke up or adjourned you then received Defense Exhibit N, the letter of July 26th?

A. That is correct.

Q. And thereafter the next thing that happened, as I recall your testimony, was a meeting about August 8th?

A. Yes, sir.

Q. Who attended that meeting?

A. The members, the employees of Lester Morton.

Q. What was done at the meeting, Mr. Evans?

A. Well, there was a—well, shall we explain the method and what happened in the meeting on the 23rd, and I believe that the proposal or the—or I believe we received over the phone or some conversation on the phone, and anyway the members brought up this point, the members present there, they said they were tired of stalling around and they wanted a working agreement, a written working agreement, and they instructed us to accomplish that, and if necessary by a strike, and that night a strike ballot was taken.

Q. I show you Defendants' Exhibit B and ask you to tell us what that is in relation to your testimony.

A. That is—or those are our strike ballots.

Q. Taken when?

A. November 8th.

Q. November 8th?

A. I mean August 8th.

Q. I show you what has been marked as Defense Exhibit O, Mr. Evans, and ask that you identify it for the purposes of the record, please.

A. That letter I can identify as received from the attorney.

Q. Received from whom?

A. Mr. Morton's attorney, Strassner.

[fol. 361] Q. And what about the document attached to it?

A. I believe on the 16th—this is a proposal, but there was no writing. That is on top here, that we received a typewritten proposal from the company, but not with this (indicating).

Q. The exhibit attached, the proposed contract enclosed with the letter, had no writing but was merely a typewritten document?

A. Yes, sir.

Q. How did the writing get on there? It was put on by the union, wasn't it, in negotiations?

A. This looks like Attorney Gallon's writing.

Mr. Hafer: We are not offering the writing on the exhibit, your Honor, because the exhibit as it was received was merely a typewritten proposal.

The Court: What then do I gather, that that accompanied a letter from the plaintiff's attorney?

Q. Is this proposed contract the one that accompanied the letter which is attached here?

A. This is without the writing, sir.

Mr. Hafer: In this connection, I would like to call the Court's attention to the fact that we are relying here only—for legal significance only on Article 11, the material part of which says:

"This agreement shall become effective when agreed by the company and union to be substantial identical to this agreement has been executed between the union and 80 per cent of the company's competitors in this type of work covered hereunder."

And that clause has no handwriting on it at all.

The Court: What is the date of the letter it accompanied?

Mr. Hafer: August 10, 1956.

By Mr. Hafer:

Q. Now, was this contract proposal discussed in the meeting of August 16th referred to in the letter?

[fol. 362] A. It was.

Q. What was the company's position and the union's position at the meeting of the 16th, Mr. Evans, as you recall it?

A. Well, this was the company's proposal and that meeting was held with the rank and file committee, negotiating committee, and the negotiating committee rejected this proposal on that day.

Q. Well, there was a meeting on the 16th, was there not, of August between the company and union representatives?

A. To the best of my knowledge, yes.

Q. What was Mr. Morton's position at that meeting?

Mr. Stauffer: If the Court please, I would like to object on the ground of materiality. The plaintiff does not deny the fact that there was a labor dispute, a seeking of a contract by the defendants, and so forth.

Mr. Hafer: I think it is of the most fundamental importance here that this Court be apprized of the real reason for the strike and how it came to pass.

We are showing or have shown the position that the plaintiff took during these negotiations. He took the position— "Well, I won't bargain with you until you get my competitors signed up."

Now, the reason for this is two-fold:

First of all, the plaintiff would hold us to a totality theory, the totality of conduct. In evaluating whether we should be held for totality of conduct I think the courts would want to know—certainly we will urge the Court that he should consider whether this was a strike affirmatively protected under the law, under federal law, or whether on the other hand it is merely a strike to get a wage increase. That is Point No. 1.

Point No. 2. It goes directly to the question of punitive damages, as the Court has previously mentioned. I pur-[fol. 363] posely did not make a motion with respect to punitive damages because I wanted to complete my proof on that issue.

The Court: I think on the latter issue I will hear it.

By Mr. Hafer:

Q. What position did Mr. Morton take at the meeting on August 16th?

A. This was their proposal.

Q. Do you recall anything specifically in the course of the oral bargaining that impressed you at that meeting?

A. No, I don't believe so, excepting this one clause that we talked about. I believe there was another one, something in there some place, if I remember correctly.

Q. Excepting which clause?

A. Article 11, where we must do certain things, to maintain certain things; for instance, get 80 per cent of his competitors and maintain 80 per cent of his competitors to have a signed agreement with him.

Q. What discussion occurred, if any, on August 16th with respect to that clause?

A. We advised that we couldn't live with—or just that we couldn't sign an agreement with that clause in it.

Q. By "that clause" you mean Article 11?

A. Article 11.

Q. What happened after the August 16th; what happened then?

A. The committee executed a strike the next morning.

Q. And that is when a strike started?

A. Correct.

Q. The very next day?

A. That's right.

Mr. Hafer: With the understanding that the writing appearing on the first two pages of Defense Exhibit O is not a part of the exhibit, we move at this time that this—we move to have the Court receive Defense Exhibit O into evidence.

[fol. 364] Mr. Stauffer: We have not yet seen the enclosure of that letter of August 10th.

Mr. Hafer: Counsel for the plaintiff has suggested that we substitute the Thermofax copy of Defendants' Exhibit O because the writing did not come through on Exhibit O, and with the leave of the Court at this time I wish to substitute for Defendants' Exhibit O a Thermofax copy thereof.

The Court: That may be done. It may be admitted.

By Mr. Hafer:

Q. How tall are you, Mr. Evans?

A. 6-11½.

Q. How much do you weigh?

A. 210 pounds.

Q. What is your age?

A. Fifty-five years.

Q. Is your weight and physical characteristics unchanged; is there any difference in your physical appearance in terms of weight or height since 1956, Mr. Evans?

A. Perhaps I am three or four pounds heavier.

Q. At any time during the Morton strike did you go to the premises of The Schoen Asphalt Paving Company?

A. No, I did not.

The Court: Did he what?

Mr. Hafer: Go to the premises of Schoen Asphalt Paving Company, your Honor.

You may cross-examine.

Cross examination.

By Mr. Stauffer:

Q. Mr. Evans, you testified on direct examination about a meeting that occurred on August 16, 1956, at which you and Plaintiff Morton and others were present, and that it was discussed there the union's request on behalf of Morton's employees for a contract.

[fol. 365]. When that meeting broke up on August 16th, 1956, had the Plaintiff Morton at any time during that meeting refused to meet again with you?

A. To the best of my knowledge, no.

Q. With regard to the Seneca County Common Pleas Court action involving this strike you were a named defendant, were you not?

A. Yes.

Mr. Hafer: Objection. Excuse me. I will withdraw the objection.

By Mr. Stauffer:

Q. Was that the first time you had been involved in any court proceeding of a similar nature?

A. You are talking about union business?

Q. Yes.

A. Yes.

Q. That was the very first time?

A. You are talking about Seneca County? You are talking about the time you went to court?

Q. Yes.

Mr. Hafer: I move that this testimony be stricken. It exceeds the scope of the direct examination.

Mr. Stauffer: This is for impeachment, if the Court please.

The Court: He may answer.

Mr. Stauffer: I think he has answered the question that that was the first proceeding.

The Court: Very well.

By Mr. Stauffer:

Q. Mr. Evans, does this name mean anything to you, F. S. Royster-Guano Company?

A. It does.

Q. Now, would you like to change your answer to the previous question?

A. In Royster I was subpoenaed as a witness. I never had any paper served on me with Royster to the best of my knowledge.

[fol. 366] Q. You were never involved in that proceeding at all?

A. Yes, I was in court on it.

Q. You were in court on it?

A. Yes; that was a long time ago.

Mr. Hafer: There is no objection if you are introducing it for impeachment purposes only, but if it is for anything else I have strenuously objected and will continue to object to it (referring to paper).

Mr. Stauffer: What is the Court's pleasure with respect to this exhibit, which is an original file copy of this court; shall we substitute a copy or—

The Court: (Interposing) I think I would abide by the decision of the Clerk there.

Mr. Livingston: We could mark this one, but I think there should be a copy provided and placed in this case so that they would not be permanently removed from the proper file.

Mr. Stauffer: We will then move the admission of Plaintiff's Exhibit 19 and ask permission to substitute a copy.

The Court: That may be done.

Mr. Hafer: Is it understood that this is being offered for impeachment purposes only?

Mr. Stauffer: That is understood.

By Mr. Stauffer:—

Q. You testified that you, among others, met with the Plaintiff Morton prior to August 16, 1956, about a union agreement, is that true?

A. I believe it was on the 23rd or 24th of July with Mr. Morton and some other people.

Q. Who were those other people, if you please?

A. I don't remember offhand. I would have to go to the record on that. They were dump truck operators.

Q. Competitors of Mr. Morton?

A. Yes.

Q. How many were there?

A. I don't remember exactly; I would say two or three. [fol. 367] Q. And the defendant union here called that meeting?

A. Yes.

Q. Requested it?

A. Yes.

Q. So that the defendant requested the meeting of the competitors, correct?

A. All companies.

Q. Yes.

Mr. Stauffer: That's all.

I have one further question. Pardon me.

Q. Did any of those that attended that meeting enter into an agreement with the Defendant Local 20 subsequent to that meeting and prior to November 1, 1956?

A. That I couldn't answer.

Q. To the best of your knowledge.

A. I wouldn't know because I went to other work. I didn't follow that up on the dump trucks.

Morning Session, Tuesday, May 9th, 1961, 9:30 o'clock A.M.

The Court: Call your next witness.

Thereupon, the Defense called as a witness, EDWARD SULLENGER, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Hafer:

Q. Will you state your name for the record as well as your business address?

A. Edward Sullenger, 435 South Hawley Street, Toledo, Ohio.

Q. What is your position?

[fol. 368] A. I am a trustee and business agent.

Q. At any time during the Morton strike, Mr. Sullenger, do you recall going to the premises of The Schoen Asphalt Paving Company in Toledo?

A. Yes, I do.

Q. Was there more than one occasion you went there?

A. Two times.

Q. On the first occasion was there any picketing out there?

A. When I went out there, no.

Q. During the time that you were at the premises did any picketing occur?

A. Yes.

Q. What did you do on this first occasion when the picketing occurred upon your arrival at the premises?

A. I went in the office and asked for Mr. James Schoen.

The Court: This was on your first visit?

A. Yes, sir.

Q. At the time you arrived at the premises was there any picketing going on?

A. No, sir.

Q. Was Mr. James Schoen present?

A. No.

Q. What happened then?

A. I asked for him and they said that he was out in the field and they called him on the car phone and he came in.

Q. About how long was it before Mr. Schoen appeared?

A. Oh, I would say 15, 20 minutes.

Q. What did you do in the meantime?

A. I was outside; I walked outside.

Q. Did you see any picketing going on?

A. Then I did.

Q. Who did you see?

A. Three pickets.

Q. Do you recall their names?

[fol. 369] A. No. There was two of them was brothers, I know that, but the other one I don't know. I don't know the names of the two brothers.

Q. Were there any other of the union's business agents there at that time?

A. Yes, just one.

Q. Who was that?

A. Mr. William Reagan.

Q. Do you know Mr. Larry Evans?

A. Yes, sir.

Q. How long have you known him?

A. Oh, I would say twenty some-odd years.

Q. Was he with you?

A. No, sir.

Q. After Mr. James Schoen arrived,—and previous testimony indicates that you had a conversation with him,—after your conversation what did you do?

A. After the conversation?

Q. Yes.

A. I went outside and explained it to the pickets what we agreed upon and we all left.

Q. Now, at any time during your visit to Schoen Asphalt on this day that the pickets were there did you see Mr. Larry Evans?

A. At no time.

Mr. Hafer: You may cross-examine.

Cross examination.

By Mr. Stauffer:

Q. With respect to your first visit to the Schoen premises there was an agreement reached there to the effect that the three Morton trucks would not be unloaded that day, is that correct?

Q. Would you answer the question, please?

A. Yes.

[fol. 370] Q. You were then acting as an agent of Teamsters Local 20?

A. Yes.

Q. In making that agreement?

A. Yes.

Q. Would you as agent of Teamsters Local 20 have been agreeable to Morton's trucks being unloaded had that agreement not been made?

Mr. Hafer: Objection. This calls for speculation. What is relevant here is what happened, what occurred.

The Court: Objection overruled. This is cross-examination.

A. I can't answer that.

Q. Why not?

A. I don't know.

Q. You don't know?

A. No.

Q. You testified on direct examination that you made at least two visits to the Schoen premises?

A. Yes.

Q. When was the first visit?

A. This time we were talking about.

Q. Well, when was it?

A. The date I couldn't answer; I don't know.

Q. What year was it?

A. 1956, I think it was.

Q. What month?

A. I don't know.

Q. It was just in 1956; you don't know when?

A. No, I don't know.

Q. How long after the first time was it that you went out there again, Mr. Sullenger?

A. I can't answer that, just exactly how many days afterward.

[fol. 371] Q. Approximately.

A. I can't answer; maybe three days, maybe two days.

Q. At least two or three days?

A. I would say so. I don't know; maybe it was one day.

Q. It could have been a week?

A. No, I don't think so; it could have been, but I don't think so.

Q. It could have been a week?

A. I don't know.

Q. You are testifying that you only went there on two occasions during the strike?

A. That's right.

Q. Who did you talk to during the second trip or visit there, Mr. Sullenger?

A. James Schoen.

Q. What did you talk about?

A. Would you repeat your question?

Q. Yes. Who did you talk to on your second trip there?

A. James Schoen.

Q. And what did you talk about?

A. About the trucks being moved out.

Q. Did you ask him why he had let the trucks be dumped?

A. I asked him why the trucks were moved out.

Q. And dumped before they were moved out?

A. I don't recall that. I asked him why the trucks were moved out.

Q. Do you recall whether you knew that the trucks had been dumped?

A. No, I don't. I can't answer that truthfully.

Q. Do you recall asking him why the trucks had been moved out when you had an agreement on the matter?

[fol. 372] A. Yes:

Q. What did he say?

A. He said he had a court order.

Q. Did he show you that court order?

A. I think he did. Yes, I know he did.

Q. And you read it?

A. Yes.

Q. I hand you Plaintiff's Exhibit 2 and ask you to look at that exhibit, Mr. Sullenger.

A. I can tell you this is it.

Q. Do you recall that you were a defendant in this action in the Common Pleas Court of Seneca County?

A. Not at that time.

Q. You were not?

A. Not until he showed me that.

Q. The question is, were you a defendant to this action in Seneca County?

A. Yes.

Q. Now, Mr. Sullenger, prior to 1956 and during the year or two previous to that were you involved in a similar proceeding of any-kind?

A. How do you mean that?

Q. You read this court order, did you not?

A. Yes.

Q. And it talked about union business agents contacting employees and employers other than the one being struck?

A. Yes.

Q. That is what it talked about?

By Mr. Stauffer:

Q. Now, you understand the nature of that court order and what it is about; you said you do, right?

A. Yes.

Q. Now, the question is, during the year or two previous to that were you involved in another action of that type? [fol. 373] A. Will you repeat what you mean? I don't know what you are talking about.

Q. I will try again. This court order refers to you as a defendant contacting the employees of other employers during a strike, does it not?

A. That's right.

Q. Now, the question is, during the year or so previous to this action were you involved in another similar proceeding?

A. Yes.

Q. What was that?

A. At LaSalle's.

Q. LaSalle's?

A. Yes.

Q. Any others?

A. No, none that I can recall.

Q. I will hand you what has been marked Plaintiff's Exhibit 20 and ask you to look at it. Also look at Exhibit "A" to that Petition. I will ask you if your name appears on it. Does it?

A. Yes, it does.

Mr. Stauffer: I will ask that Plaintiff's Exhibit 20 be introduced for purposes of impeachment, your Honor.

The Court: What is Exhibit 20? What does it purport to be?

(Thcreupon, Mr. Stauffer handed the same to the Court.)

Mr. Stauffer: For the Court's assistance, Mr. Sullenger is named on Exhibit "A" to the Petition.

The Court: You are offering it for impeachment purposes?

Mr. Stauffer: Yes, if the Court please.

The Court: In what way?

Mr. Stauffer: Well, the witness has testified that within [fol. 374] the year preceding the issuance of the court order by the Common Pleas Court for Seneca County with respect to the Morton strike this witness was not involved in any other similar activity,—

Mr. Hafer: His testimony is precisely to the contrary.

Mr. Stauffer: I haven't finished, Mr. Hafer. (Continuing)—other than the LaSalle matter, whatever that is. This shows that he was involved in another similar activity.

Mr. Hafer: It shows quite to the contrary. This is a Petition on behalf of the Regional Director against the union. This man is not a defendant in the case, and there is no hearing in the case.

The Court: Is he named in this Complaint?

Mr. Stauffer: Yes, your Honor. He is named in Exhibit "A" as one of the agents of the union that committed the unfair labor practice, allegedly, in violation of 8 (b) 4 (a), which is identical in substance with the Complaint here.

The Court: Does he deny this? Do you deny this?

A. No, but it is an NLRB case. I wasn't in no court on this. I don't remember this here.

Q. The question was broad enough to encompass this.

Mr. Hafer: Well, counsel perhaps does not know the difference between the NLRB and the courts, but the people in the labor movement know that there is quite a sharp difference, and when you ask him about a court proceeding it does not include an NLRB proceeding.

Mr. Stauffer: The word "court" was not used, Mr. Hafer.

The Court: It may be admitted.

Mr. Hafer: I want the record to show on this that there was never a hearing in the courts on this.

Mr. Stauffer: I object. This,—

The Court: (Interposing) I know nothing about that. [fol. 375] You may bring it out on redirect if you want to. It is admitted only for the purpose of impeachment of the witness.

By Mr. Stauffer:

Q. Mr. Sullenger, with regard to the second trip that you admit making to the Schoen premises what did you ask Mr. Schoen to do with respect to Morton, or what did you ask him not to do with respect to Morton from that date forward?

A. Nothing.

Q. What did you go there to talk about?

A. Them trucks was moved out.

Q. That is all you talked about?

A. Yes; and he said, "Well, I've got a court order."

Q. You asked him nothing about the future?

A. No, sir.

Mr. Stauffer: Nothing further.

Mr. Hafer: At this time we ask the Court to take judicial notice of its own file in Civil Action No. 7423, and in particular to a document entitled "Order Dismissing Proceeding for Temporary Injunction," filed on July 16, 1956, under the signature of the United States District Judge presiding in the instant case.

That order provides as follows:

"A Petition having been filed herein on September 7, 1955, for a temporary injunction enjoining and restraining respondent from engaging in certain acts and conduct set forth therein pending the final adjudication of the National Labor Relations Board with respect to such matters, and an order having been issued by the Court on September 7, 1955, requiring respondent to show cause on September 16, 1955, why such temporary injunction should not issue, and this Court having on September 16, 1955, pursuant to respondent's stipulation to refrain from said [fol. 376] acts and conduct pending the Board's final determination in the matter, and it appearing to the Court that on May 10, 1956, the National Labor Relations Board duly entered its decision and order in the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, etc., et al., and National Cement Products Co., of Toledo, Ohio (partnership) Case No. 8CC37, which

is the Board's final adjudication of the matters involved in this proceeding, and the parties having consented to an entry of this order, it is therefore ordered that this proceeding be, and the same is, hereby dismissed without cost to either party.

"Dated at Toledo, Ohio, this 16th day of July, 1956."

We ask the Court to further take judicial notice of its own file to establish the proposition that nothing in this file, which is the Court's file, indicates a hearing at which testimony was taken or witnesses were sworn or that indicates that this witness, Mr. Sullenger, or the witness, Mr. Larry Evans, were under subpoena to appear before this court in connection with the proceeding just described.

The Court: Anything further?

Mr. Hafer: Not on that point, your Honor.

Redirect examination.

By Mr. Hafer:

Q. Mr. Sullenger, what is your practice if unfair labor practices are put on your desk? What do you do with them?

A. I live up to them.

Q. The charges. Do you know what we are talking about, Mr. Sullenger, such as is attached to the exhibit here? Do you see the charge on the back of the exhibit?

A. That is put on the bulletin board in our office.

Q. Not the Petition for injunction, just the charge I am talking about.

[fol. 377] A. The first thing I do?

Q. You get Mr. Gallon, don't you?

A: I get aliold of an attorney.

Q. Then what happens after that with the charge unless Mr. Gallon tells you to do something? Do you do anything more with it after you give it to Mr. Gallon unless he tells you to do something?

A. No.

Mr. Hafer: That's all.

[fol. 430] Thereupon, the Defense called as a witness, WILLIAM REAGAN, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

- By Mr. Hafer:

Q. Will you state your name and business address, please?

A. William Reagan, 435 South Hawley Street, Toledo, Ohio.

Q. What is your association with Teamsters Local 20?

A. Business agent.

Q. How long have you been a business agent for the Teamsters?

A. About eight years.

Q. Eight years?

A. Yes, sir.

Q. Do you hold any other position with the union?

A. I am the Health & Welfare Director is all.

Q. Do you hold any elective position?

A. No.

Q. Do you recall during the Morton strike at any time going to the premises of The Schoen Asphalt Paving Company?

A. Yes.

Q. Will you describe the circumstances under which you went there, Mr. Reagan?

A. I took three pickets over there.

Q. Do you recall who they were?

A. Yes; Jack Combs, Joe Combs and Jim Marcum.

Q. About how long after the strike was this? After the start of the strike, I should say.

A. Oh, approximately three days.

Q. Where did you start your journey to the Schoen Asphalt Paving Company?

[fol. 431] A. At Tiffin; the place of business of Morton's in Tiffin.

Q. What did you do with these men after you arrived at the premises of Schoen Asphalt?

A. Two of the employees got out and picketed the entrance when the trucks showed up there.

Q. Which trucks showed up?

A. Lester Morton's trucks.

Q. Do you recall what the sign said?

A. That Lester Morton was on strike.

Q. Did anyone enter or leave the premises other than the Morton trucks at any time while you were picketing?

A. Yes.

Q. Who do you recall entered or left?

A. Schoen's trucks.

Q. Was Mr. Evans with you in the car?

A. No.

Q. Did you enter onto the premises of Schoen Asphalt?

A. No.

Q. About how long were you there?

A. Oh, approximately 45 minutes to an hour, I imagine.

Q. Did you see anyone come out of the office from where you were picketing, Mr. Reagan?

A. Yes.

Q. Whom did you see?

A. Lester Morton, Jim Schoen, and that's all,—oh, and Ed Sullenger.

Q. Did you see Mr. Evans around there?

A. No.

Q. How tall are you, Mr. Reagan?

A. Five-foot seven.

Q. And your weight?

A. Oh, about 210.

Q. And your age?

A. Thirty-eight.

[fol. 432] Q. Have your physical characteristics changed significantly since 1956?

A. No.

Q. Were you present at the premises of Morton Trucking Company on the first day of the strike?

A. Yes.

Q. What time did you arrive there?

A. At approximately six o'clock in the morning.

Q. What did you observe when you arrived there?

A. Well, there were approximately—oh, 20 or 25 people there by their cars, off the state highway, and over in front of the root beer stand across the street.

Q. I show you Plaintiff's Exhibit 1, Mr. Reagan, which is an aerial photo. Would you point out so that the Court can see where the truckers were when you arrived on the morning in question?

A. They was right here, here and across over in here (indicating), and across over in here, and this is where the pickets were all lined up.

Q. Where are the entrances on this photograph?

A. Here, here and back here (indicating).

Q. Were the men congregated in the area of the entrances?

A. No. There was a few picketing is all and the rest were all back alongside of the cars and over in this area here (indicating).

Q. How many men, if you can recall, were carrying signs?

A. I think there was approximately three or four.

Q. At each entrance?

A. No; just two on each one there, on the front entrances (indicating).

Q. Now, Mr. Reagan, during the first two or three hours of the,—or let's say from about six o'clock in the morning until eight o'clock in the morning on the first day [fol. 433] of the strike, were you at that time present at all times on the picket line?

A. I was.

Q. Who, if anyone, did you observe entering the premises of the Morton Trucking Company during those hours?

A. Well, there was all his garage employees, plus a few of his drivers and his bookkeeper, office employees, and a couple of his drivers.

Q. Was there any change in the method in which the picketing was conducted, say, at around eight or nine o'clock in the morning on the first day as compared with the rest of the day?

A. Yes. There was no picketing done. They just sat down in their cars or all dispersed about—before 10:30.

Q. What was done with the signs?

A. They were propped up in the bumpers of the automobiles.

Q. Now, at any time after 10 or 10:30 on the first day of the strike were there any men actually patrolling in the area of the entrance carrying signs?

A. No.

Q. What about the second day of the strike?

A. No.

Q. Or the third day of the strike?

A. No.

Q. Now, during the first day of the strike from about 10:30 on and during the second day of the strike and third day of the strike how many men were in the general vicinity of Mr. Morton's premises as you recall?

A. Well, they were assigned duties. There would be approximately four; there would be certain times they would come and certain times they would go.

Q. Now, in addition to the men on duty were there other [fol. 434] men congregated in the parking areas during the first three days there?

A. Yes. They had visitors that come there to talk with them. Most of the time they would go across the street and have a hot dog or something like that, parked in their cars, sitting in their cars.

Q. What changes, if any, occurred in the conduct on the picket line after the temporary restraining order was issued?

A. There was no change because we never had more than four pickets on there.

Q. Was there any change in the number of people who would have been standing in the area such as the root beer stand or in the parking area for the cars?

A. Yes. We told them, if they wanted to come over and visit they would have to do it out of the area on the right side of the road, or from where the place of business was they would have to visit across the street.

Q. This is after the order?

A. What is that?

Q. This was after the order?

Q. As far as you know were those instructions followed?

A. Yes, sir.

Q. How much time did you spend on the picket line during the strike, Mr. Reagan?

A. Oh, almost all my time was on the strike.

Q. Did any of the drivers return to work who originally supported the strike?

A. Yes.

Q. About how many?

A. Oh, about ten.

Q. This was during the entire course of the strike that some of the men went back?

A. Yes, approximately ten or fifteen.

[fol. 435] Q. Were any new drivers hired during the strike?

A. Yes, there were.

Q. Do you know how many?

A. No, I don't.

Q. Do you have any idea—one, two, ten.

A. Oh, there was at least ten.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Hafer: Your Honor, at the lunch hour I asked the Clerk to call to your attention a citation and called it to the attention of plaintiff's counsel at that time.

The Court: Is that the Ford Motor case?

Mr. Hafer: Yes. What I had in mind obviously was the question of our Amended Answer.

It seems to me that the equities of our position are stronger than they were in that case. There there was a complete trial and a verdict in favor of the plaintiff which was set aside on technical grounds and a second trial, and about four months before the second trial the defendant for the first time advised plaintiff of its wish to add a new defense and was unable to persuade the plaintiff to agree and about two weeks before the second trial filed a motion to permit the Amended Answer which raised a new legal defense.

This was denied by the Trial Court. On appeal to the Sixth Circuit it was held that an amendment should have been permitted, and that it even constituted an abuse of discretion.

Now, here we have a memorandum and I have had an opportunity to examine it before—or I didn't, before—the memorandum submitted by Mr. Gallon and Mr. Stauffer at the time of the motion to dismiss and both argue at length the question of res judicata as though it were properly pleaded. Frankly, I am satisfied in my own mind that it was not properly pleaded at that posture; but that was [fol. 436] not argued by Mr. Stauffer and Mr. Gallon assumed that it was.

In the circumstances, your Honor, what we are asking leave to do is to introduce the documentary evidence in support of it, which consists only of the Petition in the State Court, the motion to dismiss, and the journal entry of the State Court.

I think that under the Sixth Circuit case we called your attention to, we should be permitted to amend our Answer so that there is no waiver of the res judicata.

The Court: What would you insert in that Answer? What is the new matter? Have you submitted a copy of your proposed amendment to counsel?

Mr. Hafer: I did that on the first day of the trial. I served the original and left a copy with him. The original we did not leave with the Court at that time because the amendment was not allowed to be introduced. It is set forth in Paragraph 13, your Honor, of the Answer, which I am handing to you.

The Court: Mr. Clerk, would you go through this file and see if you can find the Answer that was filed to the original Complaint? I don't seem to be able to locate it.

The Clerk: I know there is an Answer, but—

The Court: (Interposing) The Answer was filed to the Amended Complaint, but there was no Answer filed to the Second Amended Complaint. I think there was a second Amended Complaint.

Mr. Gallon: There is only one Answer.

The Court: That's right. At the Pretrial Conference it was agreed that the Answer filed to the Amended Complaint would be considered the Answer to the Second Amended Complaint. Now you have added Paragraph 13 in your proposed Answer to the Second Amended Complaint.

[fol. 437] Mr. Hafer: Yes, your Honor.

The Court: What is the position of the plaintiff?

Mr. Stauffer: First of all, that this has been ruled upon in this action on the first day of trial, correctly, we believe, and with respect to the position that we took at the time we opposed the defense motion to dismiss, we were at that time addressing ourselves to the motion to dismiss and certainly were not conceding anything about the pleading of the defense, their Answer.

I am not certain at the moment whether subsequent to that time the defendants filed their Amended Answer—that is, an Answer to the Amended Complaint—or whether it was before that, but, in any event, the defendants moved to dismiss this action upon this very ground, the State Court procedure, and that question has been ruled upon twice now in the proceedings to dismiss as a result of the motion filed by the defendants and then again at the inception of this trial. So that we have not changed our position in that regard.

Mr. Hafer: If the plaintiff takes the position that the Court has ruled on it, that is perfectly agreeable to me, but if so, then it makes it perfectly obvious that we are entitled to have the pleading amended so that the record can show what the Court based its decision on so that we can urge the Court or a reviewing court with respect to the correctness of the ruling. If this issue is already so far in the case as to have received a ruling by this Court, then I think unquestionably under Rule 15 we are entitled to amend our pleading. In that circumstance it has been tried by consent and there is a waiver by plaintiff under Rule 15.

Mr. Stauffer: I don't quite understand that. I understood the ruling of the Court to be that the Answer could not be amended. I believe that was the ruling on the first day of this trial.

[fol. 438] The Court: I don't have a direct recollection of what occurred in that regard on the first day of the trial. I do recollect that when the motion to dismiss was filed I believe that motion encompassed a question that you are now seeking to raise by way of the amended answer.

Mr. Hafer: If that is the Court's understanding, and if the Court's ruling, which was a summary ruling; it was not an opinion, was intended by the Court to deny the motion because it found no legal merit in it, then I think it quite clear that under Rule 15 we are entitled to amend our Answer so that we can put in the brief documentary evidence on the point.

The Court: I don't see, Mr. Hafer, that this move at this time has any bearing upon the decision of Judge Miller in the Ford case that you referred to. That was an entirely different situation.

In the Ford case two weeks before trial the plaintiff asked leave to amend his Complaint in connection with a matter that certainly would not have disturbed the existing pleadings and would not have required a vacation of the assignment.

Here we have had this question raised on motion to dismiss, perhaps—I don't know, it may have been a year ago, but certainly it was a great many months ago. The question was briefed by both parties and the Court decided the motion. Then a pretrial was had—I think the second pretrial—and at that pretrial it was agreed that the Answer to the Second Amended Complaint would be the Answer—that the Answer to the Amended Complaint would be the Answer to the Second Amended Complaint. The Court was not apprized of any desire to amend the pleading until the first day of the trial here, if that is correct. I have no recollection of it at this time.

Mr. Hafer: That is correct, your Honor.

The Court: I do recollect that, I believe at the time the motion to dismiss was considered by this Court that this [fol. 439] order of the Court that is contained now in Paragraph 13 was before the Court in some fashion because I have read it before. It is familiar to me. The motion, as I recall, was denied generally.

Would this in any way disrupt the plaintiff by permitting such an amendment by defendants at this time?

Mr. Stauffer: If the Court please, the plaintiff has understood for many months that this issue was entirely out of the case. We were surprised on the first day when the request was renewed to obtain permission to file an Amended Answer.

It is my understanding that the Court ruled against the amendment of the answer on the first of this trial. We are surprised that the question is raised again now. I don't know what might follow from that.

The Court: In the Ford Motor case Paragraph 5 of the syllabus:

"Where original complaint alleged that manufacturer's purported termination of sales agreement had not been made in good faith, the tendered amendment alleging additionally that manufacturer had lacked good faith in the execution of the agreement did not allege a new cause of action barred by the statute of limitations."

Paragraph 4:

"Even though amendment tendered approximately two weeks before trial presented another issue, namely, lack of good faith in execution of the agreement whereas the original complaint in the dealer's suit against manufacturer for damages resulting from cancellation of agreement had merely alleged that termination of the agreement had not been in good faith it did not change in any material way the evidence which would be offered by the plaintiff, and therefore the Trial Judge should have permitted amendment to be filed."

Here, by virtue of the proposed amended pleading, you [fol. 440] are raising a question at the conclusion of the trial, virtually, that has not entered into the trial during the trial.

The question that was argued pro and con in a motion to dismiss quite some months ago was disposed of by the Court. I don't know why you should be permitted now to file an amended pleading setting up this affirmative defense. Hadn't you thought of that before?

Mr. Hafer: Yes, your Honor, counsel had thought of it before, because Mr. Gallon raised it in his brief attached to his motion to dismiss.

Mr. Gallon was under the impression that he was not required, in order to preserve the issue in the case, to keep it as part of the record on appeal, should there be an appeal, to do anything other than add in the record the denial of the motion.

In my judgment, as associate counsel—and we were called in at a very late date—I differed with Mr. Gallon in that respect and I advised him that in my judgment it was necessary to have the matter properly—or affirmatively pleaded in order to preserve the issue properly in the record, and upon that advice when I first talked with Mr. Gallon two days before the trial I immediately proceeded to prepare an Amended Answer, which we presented immediately at the opening of this trial, and that is a full and complete disclosure of why there was no earlier pleading:

The Court: I don't believe I will permit it at this time in view of the fact that the question was debated by both sides and argued to the Court at the time of the motion to dismiss. I don't believe that it would be quite in order to raise that question again.

Mr. Hafer: Mr. Gallon, please.

The Court: I may say to counsel that the motion to dismiss was filed on July 14, 1959, almost a year ago, and [fol. 441] after the briefs were filed the Court very promptly determined the motion.

You may proceed.

Mr. Hafer: Thank you.

Thereupon the Defense called as a witness Mr. JACK GALLON, who, having been previously duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Hafer:

Q. Will you state your name and occupation, please?

A. My name is Jack Gallon and I am an attorney.

Q. You are an associate with me, are you not, as co-counsel in this case?

A. Yes, I am.

Q. Did you have any dealings in connection with the Morton negotiations before and during the strike?

A. Yes, I did.

Q. I show you what has been marked Defendant's Exhibit Q and ask you to identify it for the record, please.

A. This is a file copy of a letter which I dictated to my secretary, the original of which was mailed to Mr. Lester Morton. The original was signed by myself.

The Court: What is the date of it?

A. This document is dated July 19, 1956.

Q. It refers to a meeting to be held on Monday, July 23rd. Was that meeting held to your recollection?

A. Yes, it was.

Mr. Hafer: This, like the other exhibits, your Honor, is in connection with the negotiations and is for the purpose of filling out the record.

We move the admission of Defense Exhibit Q.

[Vol. 442] Mr. Stauffer: No objection.

The Court: It will be admitted.

Mr. Hafer: This is Defense Exhibit R (handing same to Mr. Stauffer and Mr. Py).

By Mr. Hafer:

Q. I show you what has been marked as Defense Exhibit R and ask you to identify it for us, please.

A. This is a document which I received in the mail some time shortly after August 30, 1956. It is a carbon copy of a letter which has been addressed to the Honorable Robert J. Vetter, Judge of the Huron County Common Pleas Court. It is not signed and it has typed in that it was written by M. J. Stauffer and is a—or there is a personal note on the letter to me, with the initials typed in of "MJS."

Q. At the time during the strike there was pending in the state court certain litigation, was there not?

A. Yes.

Q. What was the nature of that litigation?

A. The plaintiff in this cause of action, Lester Morton, was also a plaintiff in an injunctive type proceeding in the state court. He had filed a Petition and an application for an injunction.

Q. I show you Plaintiff's Exhibit 2. Was this the injunction you are talking about?

A. Yes. This is a copy of the order, or journal entry, which was granted ex parte by the Judge of the Common Pleas Court of Seneca County.

Q. After the issuance of the ex parte order, Mr. Gallon, were any hearings held in the state court for further injunctive relief?

A. Yes. Some time within I believe a week after the issuance of this ex parte order, pursuant to a motion filed by myself on behalf of defendants in that action, a hearing was to be held in regard to the motion to vacate the injunction.

[fol. 44?] About the same time the attorney for the plaintiff had filed a motion for temporary injunction as well as, I believe, a citation for contempt and there was to be a hearing had primarily on those matters, I think.

Q. Was a hearing ever held?

A. It was begun, testimony was taken, but some time during the testimony at the judge's suggestion; I believe—and this was a different judge who had granted the order, the ex parte order—the hearing was recessed for the parties to negotiate a settlement of their differences, if possible.

Q. Was there ever a ruling based on the evidence by any of the state judges with respect to the matters in the complaint or petition for temporary injunction?

A. There never was.

Q. This letter, Exhibit R, relates to the state court litigation that we have just been discussing, is that correct?

A. Yes. My recollection is that Judge Vetter, who was the trial judge, requested both attorneys, namely, myself for the defendants, and Melvin Stauffer for the plaintiff, to keep him advised as to the negotiations, and I understood this Defense Exhibit B to be a copy for me of the document which was sent to Judge Vetter informing him of the progress.

Q. Defense Exhibit R is—

Mr. Hafer: Defendants' Exhibit R, your Honor, as such contains a statement that will speak for itself, but in any event indicating that plaintiff is most interested in getting his competitors organized, and we are introducing

Exhibit R primarily in connection with the punitive damages and our contention that this was a protective strike.

At this time we move that Defense Exhibit R be received into evidence.

The Court: Without objection it will be admitted.
[fol. 444] Mr. Stauffer: No objection.

By Mr. Hafer:

Q. I show you what has been marked Defense Exhibit S and ask you to identify it for the purposes of the record, please.

A. This is a carbon copy of a letter bearing a date of September 8, 1956, which I recall receiving some time shortly thereafter and which is addressed to the Honorable Robert J. Vetter, the same judge I referred to a moment ago, who was the trial judge in the state court proceedings. It is signed by M. J. Stauffer, or at least his name is typed here, and there is a personal message to me also which bears the first name "Mel," which appears to be his first name; and again, like the last exhibit, it is a letter to the judge telling him of the progress of the negotiations.

Mr. Hafer: We move the acceptance of Defense Exhibit S into evidence.

The Court: Without objection it will be admitted.

Mr. Hafer: I don't have a second copy of this one, your Honor. So I will first show the copy here to counsel for the plaintiff. (Handing the same to Messrs. Stauffer and Py.)

By Mr. Hafer:

Q. I show you what has been marked as Defense Exhibit T and ask you to identify it for the record, please.

A. The first sheet of the exhibit is a photographic or photostatic copy of a letter which I received in the mail some time shortly after September 12, 1956, which notes that a proposal from The Lester Morton Trucking Company in regard to collective bargaining with Local 20 is enclosed, and the letter is signed by Mr. Stauffer, the attorney for Morton at that time.

The pages which follow, which are legal sized pages, are a photostatic copy of the enclosure which was in this letter dated September 12, 1956, to the best of my recollection, which contains the items still remaining in dispute in regard to negotiations as well as items which have been agreed upon, identifying items as being company proposals or being tentatively approved.

Q. For the convenience of the record, would you read from Defense Exhibit T, the proposed Article 11 contained therein?

A. Yes. (Reading): Section One of Article 11, which is entitled "Effective Date," reads: "This agreement shall become effective when and remain effective so long as agreements agreed by the company and the union be substantially identical to this agreement have been executed between the union and 80 per cent of the following of the company's competitors and the type of work covered hereunder who own and operate three or more trucks in Erie, Huron, Sandusky, Seneca and Ottawa Counties, Ohio." * * *

And on the margin of that it is marked "C. P.," which the letter indicates is "company proposal," and then Section Two of that Article continues:

"This agreement shall continue in full force and effect for three years from and after the effective date hereof unless it lapses as provided in Section One above."

By Mr. Hafer:

Q: Thank you.

Mr. Hafer: We move the admission of Exhibit T.

The Court: Without objection it will be admitted.

Mr. Hafer: At this time we ask the Court for leave under Rule 43 (c) to make a record of excluded evidence on res judicata, and I think for purposes of convenience and expedition if I simply go through my exhibits and have Mr. Gallon identify them, with the continuing objection for the plaintiff, we would then offer the evidence and have them accepted as a part of the excluded evidence of the case under Rule 43 (c). It can be done in a very few moments.

The Court: Very well.

[fol. 446] Mr. Hafer: Let the record show that the Defendants' Exhibit U and the balance of the exhibits which I propose to offer through this witness relate to the issue of res judicata and are being submitted pursuant to my motion for a record of excluded evidence under Rule 43 (c).

By Mr. Hafer:

Q. I show you what has been marked Defendants' Exhibit U and ask you to identify it for the record, please.

A. This is a copy of a motion to dismiss which was filed on behalf of the defendant in this cause of action in this court, the original of which I believe has been filed with the Clerk.

Mr. Hafer: We move that Defense Exhibit U be received as part of our 43 (c) record.

Mr. Stauffer: We object for the record.

The Court: You are offering that by way of an offer to prove?

Mr. Hafer: It amounts to the same thing. As I understand Rule 43 (c) we must ask the leave of the Court to make a record in full of the excluded evidence, that is, this entire document. The only way we can physically get it into the record is ask leave of the Court to make a full record of excluded evidence, denominating it as such. That is what I am asking leave of this Court to do.

The Court: What is the document that you have there in your hand?

Mr. Hafer: This is a memorandum, your Honor, which was attached to and issued in support of the preceding Exhibit U.

The Court: The motion to dismiss?

Mr. Hafer: Yes.

The Court: Very well.

Mr. Stauffer: We have a continuing objection to all of this, of course.

The Court: All right.

[fol. 447] By Mr. Hafer:

Q. I show you what has been marked as Defense Exhibit V and ask you to identify it for the record, please.

A. This is a copy, a true copy, to the best of my recollection, of the memorandum which was filed in support of the motion to dismiss, which was the last exhibit, Exhibit U, and which was identified in this cause of action in this court.

Q. That was submitted in support of the motion to dismiss in this court, was it not?

A. Yes.

Mr. Hafer: We move that Exhibit V be accepted as a part of our record under Rule 43 (c).

The Court: Very well.

Q. I show you what has been as Defense Exhibit W and ask you to identify it for the record, please.

A. Yes. This was a memorandum in opposition to the motion to dismiss which I received from attorneys for the plaintiff in this proceeding pursuant to the motion which I filed which was Exhibit U and in answer to or in opposition of my memorandum and motion which I just identified as Exhibit V.

Mr. Hafer: We move that Defense Exhibit W be accepted on the same basis as the foregoing exhibits.

The Court: It may be admitted.

By Mr. Hafer:

Q. I show you what has been marked as Defense Exhibit X and ask you to identify it, please.

A. This exhibit is a copy of the motion to dismiss reply memorandum which was filed by myself on behalf of the defendants in this cause of action in this court in answer to the or in reply to the answer memorandum, all of which I just identified and all relating to the same motion to dismiss which I also earlier identified.

Mr. Hafer: I move that Defendant's Exhibit X be admitted.

[fol. 448] The Court: It may be admitted.

Mr. Hafer: I show counsel for the plaintiff what has been marked Defendant's Exhibit Y. I do not have an extra copy of it since it is his Petition filed in the state court. I am sure he has a copy of it in his file.

Q. I show you what has been marked Exhibit Y, Mr. Gallon, and ask you to tell us what it is, please.

A. This is a certified copy of a Petition filed in the State of Ohio, Court of Common Pleas of Seneca County, with Lester Morton, d/b/a Lester Morton Trucking Company as the Plaintiff, and suing Local 20 of the Teamsters as well as other named defendants, containing a first cause of action and a second cause of action.

Q. The damage Petition, isn't it?

A. Yes.

Mr. Hafer: I move that it be made a part of our record of excluded evidence.

The Court: It may be admitted.

Q. I show you what has been marked as Defendant's Exhibit Z and ask you to identify it for the record, please.

A. This is a certified copy of a motion to dismiss, the original of which—or which this was copied from, was filed on September 26, 1958, (sic), in the Common Pleas Court of Seneca County, Ohio, in the same cause of action which I just viewed the Petition of, which I believed was Defendant's Exhibit Y.

Q. That was the damage case?

A. Yes.

Mr. Hafer: We move that the Defendant's Exhibit Z be accepted in evidence.

The Court: It may be admitted.

Q. I show you what has been marked Defendant's Exhibit AA and ask you if you can identify it for the record, please.

A. This is certified copy of a journal entry of the Com-[fol. 449] mon Pleas Court of Seneca County, which dismissed the state court damage action about which I have just testified.

Mr. Hafer: I move that Defendant's Exhibit AA be accepted into evidence.

The Court: It may be admitted.

Q. I show you the file document, which has been marked Defendant's Exhibit BB, Mr. Gallon, and I believe that is the proposed Answer which we offered at the beginning of the trial and which we asked leave to file again a few minutes ago, is it not?

A. Yes, it is.

Mr. Hafer: I will ask that that be included and admitted as our last document of excluded evidence, your Honor.

The Court: It may be admitted.

Mr. Hafer: You may cross-examine.

• • • • •
Cross examination.

By Mr. Stauffer:

Q. Mr. Gallon, I will hand you Plaintiff's Exhibit 21 and ask you what it is.

A. This is a copy of a motion which I filed on behalf of the defendants in the injunction action in Seneca County and about which I testified earlier that I filed a motion to vacate this, described as to dismiss the restraining order shortly after it had been granted.

Q. On what date did you dictate that motion?

A. It appears on the top. I have no recollection of when I did it except that there are some remarks at the top which presumably were put in by a secretary and which shows that it was dictated on 8/22/56.

Q. About when was this filed with the Common Pleas Court of Seneca County?

A. I don't recall at this time.

Q. I will hand you Plaintiff's Exhibit 22, Mr. Gallon, and ask you if that is not a certified copy of the docket of the [fol. 450] Seneca County Common Pleas Court with respect filings of pleadings in the injunction action pertaining to the Morton strike.

A. It purports to be a certified copy of the Seneca County Common Pleas Court appearance and execution docket.

Q. In what case?

A. Case No. 29,500, and it is Lester Morton, d/b/a Lester Morton Trucking Company versus Local 20, Teamsters and other parties.

Q. And does that show a motion filed on August 24, 1956?

A. It says, "Motion & Notice of Hearing Filed."

Q. On what date?

A. August 24th.

Q. Was your motion granted by the Court, Mr. Gallon?

A. To my knowledge, the motion was never granted.

Q. Has the restraining order ever been dissolved?

A. To my knowledge, yes, it was dissolved.

Q. Would you examine the docket and see if it relates when it was dissolved?

A. The only entry that I would have reference to would be October 13, 1956, and it says, "Temporary Restraining Order Dissolved."

Q. And that was after the strike had concluded, was it not?

A. Yes, it was after a collective bargaining agreement had been entered into.

Q. So that this order remained in effect through the strike?

A. Yes, to my knowledge.

Q. Now, at any time and with respect to the strike did the Defendant, Teamsters Local 20, file a charge with the National Labor Relations Board against the plaintiff in this action?

A. Not to my knowledge.

[fol. 451] Q. And you were the attorney for the defendant throughout that period?

A. That's right.

Mr. Stauffer: Nothing further of this witness.

Mr. Hafer: I have nothing further, your Honor.

.

[fol. 455]

REBUTTAL EVIDENCE

Thereupon, the Plaintiff, Mr. LESTER MORTON, was himself recalled as a witness in rebuttal and, having been previously duly sworn by the Clerk, testified further as follows:

Direct examination.

By Mr. Stauffer:

Q. Mr. Morton, you have heard the testimony here to the effect that two of the proposed union agreements submitted on your behalf contained clauses to the effect that such agreements would not become effective until certain of your competitors signed similar agreements.

A. Yes.

Q. Why were those clauses in those proposals?

A. Well, before the strike Larry Evans had told me that he had most of my competitors under contract and I asked him to tell me who they were and he refused to tell me, [fol. 456] and in the proposal I think I asked my—I know I asked my attorney to put that in the proposal to see if Larry Evans is telling the truth, and if he had agreed to having that in the contract then he would be telling me the truth.

Q. When you met with the Defendant Teamster Local 20 on August 16, 1956, state whether you expected to meet again about a union contract.

A. That is on the 16th?

Q. Yes.

A. Yes, we did.

Q. State whether you ever refused to meet again with the defendant to negotiate for a contract?

A. No, I did not.

Mr. Stauffer: I would like to move the admission of Plaintiff's Exhibits 21 and 22, those being the state court motion to dismiss the injunctive proceeding and the docket of the state court.

The Court: They will be admitted.

Mr. Stauffer: That's all I have.

Cross examination.

By Mr. Hafer:

Q. Didn't you know, Mr. Morton, that there was going to be a strike on the 17th, or at the conclusion of the meeting on the 16th that there was going to be a strike the next day?

A. That is what they said.

Q. The strike then came as no surprise on the 17th when it occurred?

A. Well, I don't know. It's what they said.

Q. You knew, though, that the union on the 16th—you knew the union was going to go out on strike, didn't you?

A. That's what they told me, yes.

[fol. 457] Q. And you had meetings after the strike started, didn't you?

A. Yes, sir.

Q. And you continued to make contract proposals, continued to state orally that you wanted a clause protecting you from your competitors, didn't you?

A. That's because Larry Evans said that he had a contract with most of my competitors, that's right.

Mr. Hafer: May I have Defense Exhibit E?

(Thereupon, the Clerk produced the said exhibit.)

Q. Do you remember when you were on the stand the last time, Mr. Morton? Do you remember that? Do you,—

A. (Interposing) I remember being on the other,—

Q. (Continuing) —Do you remember when you were on the stand a week ago?

A. Yes; I remember.

Q. Do you remember that I showed you a letter written to your employees?

A. Yes, and you showed me the letter.

Q. You remember that you had to read it twice?

A. Yes, that's right.

Q. I want you to look at that letter again, and I want you to read in open court the first two sentences of the last paragraph of that letter, Mr. Morton.

A. The last,—

Q. (Interposing) The first two sentences of the last paragraph,—or the second paragraph, rather.

I want you to read it so that the Court can hear what is in there.

A. (Reading): "In the meantime I expect to conduct my business under the protection of the Court order and so long as the few remaining jobs remain any former employees who are now on strike will be considered for these jobs. In short, my willingness to sign a contract has and will not be affected by this strike."

[fol. 458] Q. And what comes next? Well, you read the last two. Let me read them for you. You read along with me.

The first two sentences of the second paragraph read as follows (Reading):

"I met with the union again on August 29th and discussed contract terms with its representatives. We were able to agree on several points, but the union has not as yet—has not indicated its willingness to agree that I will not be bound until most of my competitors are.

I simply cannot afford to agree to a contract without a provision that will protect me in this regard." Now, did I read it correctly, Mr. Morton?

A. I can't see too good there. I am too far away.

Q. You read it over and tell me if I read it correctly, Mr. Morton.

A. I guess you did.

Q. And this is the letter you sent to your employees telling them what your position in the strike was, isn't it?

A. Partly.

Q. Well, what else is it, Mr. Morton, if it is only partly that?

A. Mr. Evans can't produce to me any contracts yet that he had with my competitors.

Q. Where in that letter,—you show me,—where in that letter does it say I am insisting on this clause because I

want to see if Mr. Evans is a truthful man; you show me in the letter where it says that.

A. I can't see anything in the letter.

Q. Nothing in there, is there, Mr. Morton?

A. [No response.]

Mr. Hafer: That's all. I have nothing further.

The Court: Anything further?

Mr. Stauffer: Yes, your Honor.

[fol. 459] Redirect examination.

By Mr. Stauffer:

Q. In this letter Defendants' Exhibit E, Mr. Morton, you stated that you could not afford to sign a contract unless your competitors had done so, is that correct?

A. Yes, sir.

Q. What did you mean by that?

Mr. Hafer: Objections. It speaks for itself.

The Court: I think that would speak for itself.

A. I meant that I couldn't afford,—

Mr. Hafer: (Interposing) Just a minute.

The Court: The objection is sustained.

Q. And you did sign a contract with the defendant in the early part of October of 1956, did you not?

A. Yes, sir.

Q. Did that contract have a clause in it about your competitors signing contracts?

A. No, it did not.

Mr. Stauffer: I think that's all.

Mr. Hafer: We have no further cross-examination of the witness, your Honor.

[fol. 460]

PLAINTIFF'S EXHIBIT 2

In the Common Pleas Court of Seneca County, Ohio
No. 29,500

LESTER MORTON, d/b/a Lester Morton Trucking Co.,
Plaintiff,

v.

LOCAL 20, TEAMSTERS, etc., et al., Defendants.

Upon filing of the petition herein, notice thereof being dispensed with, the Restraining Order as prayed for in the petition is hereby granted upon giving of bond in the amount of Three Thousand Dollars (\$3,000.00) to be deposited with the Clerk of this Court, restraining the individual defendants and each : ' all of them, and all persons, associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

[fol. 461] 1. From all acts of violence, force, intimidation or threats directed toward plaintiff, his agents, employees, representatives, customers and others having business with plaintiff.

2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representatives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, obstructing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent any of plain-

tiff's customers or any other members of the public from having business relations with the plaintiff.

4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

5. From using profane, obscene or abusive language directed toward plaintiff, his agents, employees and representatives, or toward the public.

6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business or any part thereof.

7. From interfering with the ingress or to egress from said place of business by trucks or conveyances of any kind.

8. From protecting, aiding, abetting or assisting anyone in the commission of any of said acts hereinabove mentioned.

RALPH SUGRUE,
Judge.

Served 8/24/56..

[Certificate omitted.]

[fol. 471]

PLAINTIFF'S EXHIBIT 14

Lost Rental Revenue
O'Connell Work
Lester W. Morton

	Units	Value	
Total available	10,782.2 T	\$ 7,489.52	
Morton hauled	3,610.35 T	2,882.44	
Lost	7,171.85 T	<u>\$ 4,607.08</u>	\$ 4,607.08
Rate per ton (average approx.)....	65¢		
Tons per load.....	13		
No. of truckloads.....	552		
Mileage in average haul—round trip	37 mi		
Total mileage lost.....	20,424		
Gasoline cost			
Average mileage per gallon.....	5 mi		
No. of gallons.....	4,085		
Cost per gallon.....	22.2¢		
Total gasoline cost.....	\$ 906.87		\$ 906.87
Oil cost			
No. of quarts per 100 miles.....	1		
" " " lost mileage	204.24		
Cost of oil per quart.....	20¢		
Total cost of oil.....	40.85		40.85
Labor costs			
Average hours per trip.....	1½		
Total hours	738 Hrs.		
Rate per hour.....	\$ 1.50		
Total labor cost.....	1,104.00		1,104.00
			<u>\$ 2,051.72</u>
Loss after deduction of gasoline, oil and labor cost.....			\$ 2,555.56
Amendment to Correct Labor Cost			
Correct rate \$1.60 per hour			
Additional cost of 10¢ per hour.....			73.69
Loss after deduction of gasoline, oil and labor cost— amended			<u>\$ 2,481.76</u>

[fol. 472]

PLAINTIFF'S EXHIBIT 15

Lost Rental Revenue
Seneca County Contract
Lester W. Morton

	Units	Value	
Amount lost per testimony.....	5,758.60 T	\$ 3,778.53	\$ 3,778.53
Average rate per ton—price.....	65.6¢		
Average weight per truckload.....	13 T		
Number of truckloads.....	443		
Mileage per round trip—average.....	14 mi		
Total mileage lost.....	6,202 mi		
Gasoline cost			
Average mileage per gallon.....	5 mi		
No. of gallons to be used.....	1,240		
Cost per gallon.....	22.2¢		
Total gasoline cost.....	\$ 275.28		\$ 275.28
Oil cost			
Number of quarts per 100 miles.....	1		
" " " lost mileage.....	62		
Cost of oil per quart.....	20¢		
Total cost of oil.....	\$ 12.40		12.40
Labor cost			
Hours spent per truckload—average.....	.75		
Total hours.....	332.25		
Rate per hour.....	\$ 1.50		
Total labor cost.....	\$ 498.38		498.38
			<u>\$ 786.06</u>
Loss after deduction of gasoline, oil & labor cost.....			<u>\$ 2,992.47</u>
Amendment to correct Labor Cost			
Correct labor cost \$1.60 per hour.....			33.23
Additional labor cost, of 10¢ per hour.....			
Loss after deduction of gasoline, oil & labor cost—amended.....			<u>\$ 3,025.70</u>
			<u>66.46</u>
			<u><u>\$ 2,959.24</u></u>

[fol. 473]

PLAINTIFF'S EXHIBIT 16

Lost Rental Revenue—Amended (Notes A & B)
 Wilson Sand & Gravel Company (Holderman)
 Lester W. Morton

	Units	Value	
Total tonnage hauled on entire contract (A)	32,991.85 T		
Less—Tonnage hauled before 8/17/56.....	14,173.70 T		
Hauled by Morton on 8/22 & 8/23/56	86.95	14,260.65	
Tonnage available to Morton	18,731.20 T	\$30,604.32	\$20,604.32
Rate per ton.....	\$ 1.10		
Average weight per truckload.....	17 T		
Number of truckloads.....	1,102		
Mileage in average round trip.....	65		
Total mileage lost.....	71,630		
Gasoline cost			
Average mileage per gallon.....	5		
Number of gallons usable.....	14,326		
Cost per gallon.....	22.2¢		
Total gasoline cost.....	\$ 3,180.37		\$ 3,180.37
Oil cost			
Number of quarts per 100 miles.....	1		
Number of quarts for lost mileage.....	716		
Cost of oil per quart.....	20¢		
Total cost of oil.....	\$ 143.20		143.20
Labor cost			
Hours per truck load—average.....	2.5		
Total hours.....	2,755		
Rate per hour (B).....	\$ 1.60		
Total labor cost.....	\$ 4,408.00		\$ 4,408.00
			\$ 7,731.57
Loss after deduction of gasoline, oil & labor cost—amended			\$12,872.75

Note A—Amended to reflect tonnage hauled per Wilson Sand & Gravel Company records.

Note B—Amended to reflect correct rate per labor hour of \$1.60.

[fol. 474]

PLAINTIFF'S EXHIBIT 17

**Lost Rental Revenue
Lauder & Son Contract
Lester W. Morton**

	Units	Value
Total contract—batches (B).....	29,574 (B)	\$22,180.50
At batch rate.....	4,720 (A)	
Actually hauled at hourly rate	312	5,032 (B) 3,774.00
Lost	24,542	<u>\$18,406.50</u> <u>\$18,406.50</u>
Rate per batch.....	75¢	
Number of batches per truckload.....	3	
Total number of truckloads.....	8,181	
Mileage in average haul—round trip	2.6 mi	
Total mileage lost.....	20,452.5	
Gasoline cost		
Mileage per gallon of gas.....	3	
Cost of gasoline per gallon.....	23.2¢	
Number of gallons of gasoline... ..	6,817.5	
Cost of gasoline for lost mileage. \$	1,513.49	\$ 1,513.49
Oil used on lost mileage		
Number of quarts per 100 miles ..	1	
" " " lost mileage... ..	204.53	
Cost of oil per quart.....	20¢	
Total cost of oil.....\$	40.91	40.91
Labor cost on lost rentals		
Loads hauled per hour.....	3	
Total hours	2,727	
Rate per hour.....\$	2.20	
Total labor cost.....\$	5,999.40	5,999.40
		<u>\$ 7,553.80</u>
Loss after deduction of gasoline, oil and labor cost.....		\$10,852.70
Amendment to Correct Labor Cost		
Correct rate \$2.35 per hour		
Additional cost of 15¢ per hour		409.05
Loss after deduction of gasoline, oil and labor cost—amended		<u>\$10,443.65</u>

(A) Testimony of Lauder & Son, Inc.

**Lost Rental Revenue
Additional Expenses Chargeable and Summary
Lester W. Morton**

[fol. 475]

	Lauder & Son	O'Connell	Seneca County	Wilson Sand & Gravel	Total
Loss After Deduction of Gasoline, Oil and Labor Cost—Amended	\$10,443.65	\$ 2,481.76	\$ 3,025.70	\$12,871.75	\$28,823.86
Additional Chargeable Costs					
Pay roll taxes and workmen's compensation:					
Workmen's comp.	2.76%				
Social Security	2.00				
Unemployment—Ohio	2.00				
Federal3				
Total	7.06%	\$ 452.44	\$ 83.14	\$ 37.53	\$ 584.31
7.06% of labor					
Axis mile tax					
Average rate 1/4¢ per mile	-0-		-0-	895.38	997.50
Rate 1/4¢ per mile	-0-	102.12			
Liability Insurance					
\$2.04 per \$100 of revenue	375.49	93.98	77.08	420.33	966.88
Costs and expenses being variable in some de- gree (by agreement with defendants' account- ant and represents the following: Parts and accessories, tires and tubes, garage and shop supplies, tire recapping, freight and cartage) ..	930.80	557.73	169.30	1,955.93	3,613.76
80/120 or 61.5% of gasoline cost					
Total Additional Chargeable Costs	\$ 1,758.73	\$ 836.97	\$ 282.91	\$ 3,582.54	\$ 6,462.45
Net Loss as Computed	\$ 8,684.92	\$ 1,644.79	\$ 2,741.79	\$ 9,289.91	\$22,361.41
			66.46		66.46
			2,675.33		2,675.33

PLAINTIFF'S EXHIBIT 18

[fol. 476]

PLAINTIFF'S EXHIBIT 21

In the Common Pleas Court of Seneca County, Ohio
No. 29,500

LESTER MORTON, d/b/a Lester Morton Trucking Co.,
Plaintiff,

v.

LOCAL No. 20, TEAMSTERS, etc., et al., Defendants.

Motion.

Now come the defendants and moves the Court to Dis-
miss the temporary restraining order of the Plaintiff's, be-
cause there is no basis for it both in law and in fact.

Fink & Canelli,
Attorneys for the Defendants.

[fol. 477]

PLAINTIFF'S EXHIBIT 22

29500

Seneca Common Pleas Appearance and Execution
Docket—No. 91.

August 21" 1956

Amount Deposited by Lester Morton.

To Apply on Costs \$25.00.

Names of Parties to Suit.

Lester Morton, D. B. A. Lester Morton Trucking Co., Route
#2, Tiffin, Ohio,

vs.

Local 20, Teamsters, Chauffeurs and Helper's Union, an
affiliate of the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helper's of America,
807 East State Street, Fremont, Ohio;

[fol. 499]

DEFENDANT'S EXHIBIT E

Lester W. Morton
Hauling Contractor
Findlay Road
Phone 2657-

Tiffin, Ohio

August 31, 1956

To all employees of Lester Morton Trucking Co.:

I think that each of you has the right to hear directly from me regarding my position concerning the labor contract negotiations with the Teamsters Local 20.

I met with the union on August 15th, 1956 and the union told me that if I did not agree to its contract that day, there would be a strike the next morning. The union knew that it was impossible for me to agree to an entire contract on such short notice. The union was not satisfied with a lawful strike but engaged in unlawful mass picketing and unlawful interference with my business relations with various customers and suppliers. As you know, this unlawful conduct is now prohibited by a Court Order which was issued on August 22nd and which is still in effect. I want to be fair with you and the union, but I will not tolerate unlawful acts.

I met with the union again on August 29th and discussed contract terms with its representatives. We were able to agree on several points but the union, as yet, has not indicated its willingness to agree that I will not be bound by a contract until most of my competitors are. I simply cannot afford to agree to a contract without a provision that will protect me in this regard. Therefore, whether a contract is eventually signed, is a matter that [fol. 500] the union has within its power to prevent or accomplish. In the meantime, I expect to conduct my business under the protection of the Court Order, and, so long as the few remaining open jobs remain, any of my former employees who are now on strike, will be considered for

these jobs. In short, my willingness to sign a contract has and will not be effected by this strike.

Sincerely,

Lester Morton,
Lester Morton.

DEFENDANT'S EXHIBIT H

Morton vs. Local 20.

Toledo, Ohio

Payroll Week Ending	No. of Drivers	Payroll			
		Office	Mechanics	Drivers	Total
7/ 7/56	39	\$176.40	\$1,035.31	\$1,541.00	\$2,752.71
7/14	39	176.40	1,175.21	2,928.00	4,279.61
7/21	50	164.25	1,141.84	3,723.02	5,029.11
7/28	51	179.10	1,149.46	4,254.13	5,582.69
8/ 4	50	176.40	1,029.89	2,838.03	4,044.32
8/11	48	176.00	1,070.42	3,413.08	4,659.90
8/18	32	177.75	838.20	1,256.40	2,271.00
8/25	20	179.10	920.82	1,146.28	2,244.85
9/ 1	29	176.40	930.46	2,233.89	3,343.45
9/ 8	32	176.40	851.09	1,737.47	2,764.96
9/15	30	176.40	979.34	2,077.12	3,232.86
9/22	33	176.40	957.71	2,518.44	3,652.55
9/29	34	176.40	928.11	2,838.73	3,943.24
10/ 6	37	176.40	781.66	2,850.38	3,808.44
10/13	48	180.45	1,082.68	4,080.84	5,343.97
10/20	48	176.40	1,028.75	4,366.31	5,571.46
10/27	51	176.40	1,130.41	4,699.35	6,006.19
11/ 2/56	48	179.10	1,025.43	4,337.48	5,542.01

[fol. 508]

DEFENDANT'S EXHIBIT O

Flynn, Py & Kruse
Attorneys and Counsellors
165 East Washington Row
Sandusky, Ohio

Telephone 213

James F. Flynn
John R. Py
Richard R. Kruse
Raymond N. Watts

Melvyn J. Stauffer
August 10, 1956

Mr. Lawrence Evans
Teamsters Local
Union Hall
Fremont, Ohio

Dear Mr. Evans:

As requested, please find enclosed a copy of the contract proposed by our client, Mr. Lester Morton.

Confirming our telephone call over long distance of the 10th, we and Mr. Morton will meet with you at the Union Hall in Fremont on August 16th, at 3:00 o'clock P. M. to discuss the proposed contract.

Yours very truly,

Flynn, Py & Kruse,

By M. J. Stauffer,
M. J. Stauffer.

mjs/b
encl.

[fol. 509]

Article I.

Employment.

Section 1. The Company and Union agrees that all employees who are covered by this agreement shall become members of the Union within sixty days after the execution of this agreement or within thirty days after they are hired, whichever date is later.

Article II.

Recognition.

Section 1. The Company recognizes the Union and the exclusive representative for purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment as provided herein for all of its employees, except its supervisory employees, all garage employees, office and clerical employees, which supervisory, office and clerical employees, shall not be included in the bargaining unit.

[Articles relating to rates of pay, scope of agreement, check off, management and administration, seniority, leaves of absence, grievance procedure and off season work omitted.]

Article XI.

Effective Date.

Section 1. This agreement shall become effective when agreements, agreed by the Company and the Union to be substantially identical to this agreement, have been executed between the Union and eighty percent (80%) of the Company's competitors in the type of work covered hereunder who own and operate three (3) or more trucks in [fol. 510] Erie, Huron, Sandusky, Seneca, and Ottawa Counties, Ohio. This agreement shall continue in full force and effect for one (1) year from and after the effective date hereof.

In Witness Whereof, the parties hereto have executed this agreement in duplicate this day of 1956.

Company:

Lester Morton Trucking Company,

By

Union:

Local of the International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen and
Helpers of America, AFL-CIO.

By

[fol. 586]

DEFENDANT'S EXHIBIT R

Finn, Py & Kruse
Attorneys and Counsellors

165 East Washington Row

Sandusky, Ohio

Telephone 213

James F. Flynn
John R. Py
Richard R. Kruse
Raymond N. Watts

Melvyn J. Stauffer
August 30, 1956

Honorable Robert J. Vetter
Judge, Huron County Common Pleas Court
Huron County Court House
Norwalk, Ohio

Re: Lester Morton et al. v. Teamsters-Local 20 etc.
et al. Seneca County Common Pleas Case No.
29,500.

Dear Judge Vetter:

At the conclusion of the proceedings on August 27th,
you asked to be informed of the developments of the labor

negotiations between the parties, in the captioned matter, on August 29th.

We met at the labor hall in Fremont and present were, among others, Attorney Jack Gallon and Secretary Wes. Meinke for the union and Messrs. Watts, Morton and the undersigned for the company. We discussed contract terms for four solid hours without any recess and made some real progress as the result of both sides compromising on some [fol. 587] points. We have not, however, reached the critical question of the manner in which Mr. Morton can be protected until the union has contracts with his competitors. There are also several other points which will be most difficult to resolve.

The next negotiation session has been tentatively set for September 4th at 1:30 o'clock P. M. at the Fremont Labor Hall. If the meeting is not held that day, it will be held the following day.

We will keep you posted on the developments.

Sincerely yours,

Flynn, Py & Kruse,

By: M. J. Stauffer.

MJS:mjb

cc: Mr. Jack Gallon

[fol. 588]

DEFENDANT'S EXHIBIT S

Flynn, Py & Kruse
Attorneys and Counsellors
165 East Washington Row
Sandusky, Ohio

Telephone 213

James F. Flynn
John R. Py
Richard R. Kruse
Raymond N. Watts

Melvyn J. Stauffer
September 8, 1956

Honorable Robert J. Vetter
Huron County Common Pleas Judge
Huron County Court House
Norwalk, Ohio

Re: Morton v. Teamsters Local #20, et al Seneca
County Case No. 29,500

Dear Judge Vetter:

We are in receipt of a copy of a letter addressed to you from Attorney Jack Gallon in the above matter dated Sept. 7, 1956.

Without bothering you with each incorrect statement in Mr. Gallon's letter, we would like to set the record straight by pointing out that although many individual clauses have been tentatively agreed to, there are many more important ones that have not been agreed to and will take additional conscientious negotiation.

The union has not signed contracts with five or six of Morton's competitors. The signatories, with one or two exceptions, are suppliers of Morton. (We assume that Mr. Gallon's second paragraph contains a typographical [fol. 589] error in indicating that the union wants a list of our "creditors", but one can never be sure.) Actually, we have submitted the names of 22 competitors to the union and will have more to submit this Monday.

Frankly, we are appalled by Mr. Gallon's unfair statement that we have been stalling and holding up the settlement of the labor dispute. Actually, the negotiations have been conducted at a sacrifice of our other work and Mr. Morton, of course, is losing money daily as a result of the strike.

We will, of course, be ready to resume the hearing at the Court's pleasure.

Very truly yours,

Flynn, Py & Kruse,

By: M. J. Stauffer.

MJS:mjb

cc: Atty. Gallon

[fol. 590]

DEFENDANT'S EXHIBIT T

Flynn, Py & Kruse
Attorneys and Counsellors

165 East Washington Row

Sandusky, Ohio

Telephone 213

James F. Flynn

John R. Py

Richard R. Kruse

Raymond N. Watts

Melvyn J. Stauffer

Sept. 12, 1956

Mr. Jack Gallon
Fink & Canelli
Attorneys-at-Law
921 Edison Bldg.
Toledo, Ohio

Re: Lester Morton Trucking Co. v. Teamsters Local
No. 20 etc.

Dear Jack:

Enclosed you will find a very hastily prepared instrument which contains what I believe to be the clauses tenta-

tively agreed upon by the parties and the Company's proposals for certain other important provisions. I trust that you will overlook any errors that I have made. I had great difficulty in unscrambling my notes of our rambling negotiations.

It is my suggestion that if there is sufficient time, after the depositions Friday, you and I can go to the Fremont Hotel where we can discuss the enclosure. I would be [fol. 591] happy to take you to dinner if you have the time that evening.

Very truly yours,

Flynn, Py & Kruse,

By Mel,

M. J. Stauffer.

MJS:mjb

encl.

cc: Mr. Morton

Proposed agreement between Lester Morton and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

This agreement made and concluded this day of, 1956, by and between Lester Morton d/b/a Lester Morton Trucking Company of Tiffin, Ohio (hereinafter referred to as the "Company") and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereinafter referred to as the "Union").

[Substantive clauses relating to recognition, rates of pay, check off of Union dues, scope of agreement and emergency provisions, management and administration, leaves of absence, seniority, rest periods, grievance procedure omitted.]

Article XI.

Effective Date.

Section 1. This agreement shall become effective when, and remain effective so long as agreements, agreed by the [fol. 592] Company and Union to be substantially identical to this agreement, have been executed between the Union and eighty percent (80%) of the following of the Company's competitors in the type of work covered hereunder who own and operate three (3) or more trucks in Erie, Huron, Sandusky, Seneca, and Ottawa Counties, Ohio:

Section 2. This agreement shall continue in full force and effect for three years from and after the effective date hereof unless it lapses as provided in Section 1 above.

In Witness Whereof, the parties hereto have executed this agreement in duplicate this day of, 1956.

[Lines for signature omitted.]

DEFENDANT'S EXHIBIT U

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

No. Civil 8222.

LESTER MORTON dba Lester Morton Trucking Company,
Plaintiff,

v.

LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS UNION,
an Affiliate, etc., et al., Defendant.

Motion to Dismiss.

Defendant moves the Court for an order dismissing the amended complaint in the captioned case since the court

[fol. 593] lacks jurisdiction of the subject matter and the amended complaint fails to state a claim upon which relief can be granted.

Law Offices of Jack Gallon.

[fol. 604]

DEFENDANT'S EXHIBIT Y

MJS/jg 8/6/58 6

In the Common Pleas Court of Seneca County, Ohio.

No. 30057.

**LESTER MORTON, d/b/a Lester Morton Trucking Company,
Route No. 2, Tiffin, Ohio, Plaintiff,**

v.

**LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPER'S UNION,
an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helper's of
America, 807 East State Street, Fremont, Ohio,**

**LAWRENCE EVANS, Individually and as Business Agent for
Local 20, Teamsters, Chauffeurs and Helper's Union,
807 East State Street, Fremont, Ohio,**

**EDWARD SULLENGER, Individually and as Business Agent
for Local 20, Teamsters, Chauffeurs and Helper's
Union, 4653 Hannaford Drive, Toledo, Ohio,**

**IRVIN MOWRY, Individually and as Business Agent for Local
20, Teamsters, Chauffeurs and Helper's Union, R. F. D.
Bloomville, Ohio, Defendants.**

Petition.

(Filed 8/14/58 at 1:12 P. M.)

First Cause of Action.

Now comes the plaintiff and for his first cause of action says that he is engaged in the trucking business as a sole [fol. 605] proprietor under the name of Lester Morton Trucking Co. at Tiffin, Ohio, and he has been so engaged at

said place of business at all times hereinafter complained of.

Plaintiff further says Defendant Local 20, Teamsters, Chauffeurs, and Helper's Union is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helper's of America; and that defendants Lawrence Evans, Edward Sullenger, and Irvin Mowry are business agents for said defendant Local 20.

Plaintiff further says that defendants Lawrence Evans, Edward Sullenger, and Irvin Mowry are sued individually and as an officer, agent or member of said defendant Local 20 and that said defendant's officers, agents and members are duly authorized and do represent and receive orders and directions from said defendant Local 20 in all matters herein complained of.

Plaintiff further says that on the 17th day of August, 1956, at about 5:30 o'clock a. m. certain of the defendants and certain other individuals unknown to the plaintiff appeared at the entrance of his place of business carrying signs which stated that defendant Local 20 was on strike against the plaintiff and engaged in unlawful mass picketing against the plaintiff.

Plaintiff further says that said unlawful mass picketing was continued by the defendants until August 21, 1956 on which date an injunction against said unlawful picketing was issued by this court against the defendants; and that said unlawful mass picketing continued even after the issuance of said injunction and that said court order was violated by some or all of the defendants herein.

Plaintiff further says that in picketing the business premises of the plaintiff as aforesaid, each of the defendants [fol. 606] acted in concert with all of the other defendants in organizing, promoting, conducting and prosecuting said unlawful mass picketing and individually and in concert with each other participated in, counseled, encouraged, aided and abetted and knowingly and willingly permitted said unlawful mass picketing by as many as sixteen (16) persons.

Plaintiff further says that as a result of defendants' unlawful mass picketing as aforesaid, the defendants and each of them seriously interfered with the conduct of plaintiff's business and with the rights of the plaintiff and the public to free, unobstructed and peaceful ingress to and egress from plaintiff's place of business.

Plaintiff further says that as the result of the aforesaid conduct and acts on part of the defendants, plaintiff was prevented from conducting its normal business operations, and lost several large and profitable jobs.

Second Cause of Action.

For his second cause of action Plaintiff incorporates herein by reference all the allegations set forth in his first cause of action as fully as if set forth at length herein and further says that during the course of the strike against the plaintiff engaged in by the defendants as set forth in the first cause of action, the defendants engaged in unlawful secondary boycott activities against the plaintiff with the purpose and malicious intent to destroy the business of the plaintiff.

Plaintiff further says the unlawful and malicious secondary boycott activities engaged in by the defendants against the plaintiff, as aforesaid, caused great damage to the plaintiff in that he lost numerous trucking jobs [fol. 607] as a result of said secondary boycott activities from which he would have received substantial profits but for said secondary boycott activities.

Plaintiff further says that he has been further damaged by the unlawful, wrongful and malicious acts of the defendants set forth in this petition in that it was necessary for him to retain legal counsel, at considerable expense, to obtain an injunction against said defendants arising out of said unlawful, wrongful and malicious acts.

Wherefore, plaintiff prays judgment against the defendants in the amount of Fifty Thousand Dollars (\$50,000.00) as compensatory damages and Fifty Thousand Dollars (\$50,000.00) as punitive damages for a total of One Hun-

dred Thousand Dollars (\$100,000.00) plus the costs of this action and for such other and further relief as may be just and proper in the premises, both at law and in equity.

Flynn, Py & Kruse,
Attorneys for Plaintiff.

State of Ohio }
County of Erie } ss.:

Lester Morton being first duly sworn, says that he is the plaintiff in the foregoing action and that the statements and allegations contained therein are true as he verily believes.

LESTER MORTON,
Lester Morton.

Sworn to before me and subscribed in my presence this
14 day of August, 1958.

M. J. STAUFFER,
Notary Public.

[fol. 608]

Praeceptum.

To the Clerk:

Please issue summons to the Sheriff of Seneca County, Ohio, for service upon defendant, Irwin Mowry, individually and as business agent for Local 20, Teamsters, Chauffeurs and Helper's Union.

Also issue summons to the Sheriff of Lucas County for service upon defendant Edward Sullenger, individually and as business agent for Local 20, Teamsters, Chauffeurs and Helper's Union.

Also issue summons to the Sheriff of Sandusky County, Ohio for service upon defendants, Lawrence Evans, individually and as business agent for Local 20, Teamsters, Chauffeurs and Helper's Union, and Local 20, Teamsters, Chauffeurs and Helper's Union.

Endorse on all of said summonses: "Action for Monetary and Other Relief; Amount Claimed One Hundred Thousand Dollars (\$100,000.00)", and make same returnable according to law.

Flynn, Py & Kruse,
Attorneys for Plaintiff.

[fol. 609]

DEFENDANT'S EXHIBIT Z

In the Court of Common Pleas of Seneca County, Ohio.

No. 30057.

LESTER MORTON, d/b/a Lester Morton Trucking, Plaintiff,

v.

LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS UNION,
an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers of
America, et al., Defendants.

Motion to Dismiss.

(Filed 9/26/58 at 8:54 A. M.)

Now come the defendants herein who have been duly served by and through their attorney, Jack Gallon, and move the court to dismiss the petition filed herein on the ground that this court lacks jurisdiction of the subject matter of the action, and lacks jurisdiction to grant the relief requested on the ground that the conduct complained of is pre-empted and foreclosed to state authority and control by the Labor Management Relations Act, 1947; 61 Stat. 136, 29 U. S. C. A. 145.

Said defendants who have been duly served further request the court for an order to dismiss either the first cause of action herein or the second cause of action herein if the court does not grant the relief asked for by said defendants above. This relief is prayed for on the same grounds as the motion to dismiss the entire action as stated above.

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[fol. 610]

DEFENDANT'S EXHIBIT AA

In the Common Pleas Court of Seneca County, Ohio.

No. 30057.

LESTER MORTON, d/b/a Lester Morton Trucking Company,
Plaintiff,

vs.

LOCAL 20, TEAMSTERS, etc., et al., Defendants.

Journal Entry.

(Filed 6/23/59 at 8:56 A. M.)

It is Ordered that this matter be, and the same hereby is, dismissed otherwise than upon the merits, without the consent of the plaintiff, without prejudice to a new action based upon the same subject matter, and for the reason that the Court does not have jurisdiction of the subject matter under the decision of the United States Supreme Court in San Diego Building Trades Council v. Garmon, 49 ALC 485. Exceptions saved to the plaintiff and defendant's Costs taxed to the plaintiff.

Judge.

Approved as to Form:

Attorneys for Plaintiff,

Attorney for Defendant.

[fol. 611]

DEFENDANT'S EXHIBIT BB

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.
C. A. No. 8222.

LESTER MORTON, etc., Complainant,

v.

LOCAL 20 TEAMSTERS, etc., Defendant.

Answer to Second Amended Complaint.

1. For answer to the Second Amended Complaint of the plaintiff as to the allegations contained in paragraph 1 of said Second Amended Complaint, defendant admits that there is no diversity of citizenship between the parties.

2. With respect to the allegations of the Second Amended Complaint contained in paragraph 2 of plaintiff's Second Amended Complaint, defendant admits that plaintiff is engaged in the trucking business as a sole proprietor under the name of Lester Morton Trucking Company at Tiffin, Ohio.

3. Further answering, defendant denies that the amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000).

4. Defendant admits that it is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

5. Defendant denies the allegations in paragraph 5 of plaintiff's Second Amended Complaint.

[fol. 612] 6. Defendant denies the allegations of paragraph 6 of plaintiff's Second Amended Complaint.

7. Defendant denies the allegations of paragraph 7 of plaintiff's Second Amended Complaint.

8. Defendant denies the allegations of paragraph 8 of plaintiff's Second Amended Complaint.

9. Defendant denies the allegations of paragraph 9 of plaintiff's Second Amended Complaint.

10. Defendant denies the allegations of paragraph 10 of plaintiff's Second Amended Complaint.

11. Defendant denies the allegations of paragraph 11 of plaintiff's Second Amended Complaint.

12. Defendant denies each and every allegation contained in plaintiff's Second Amended Complaint not hereinabove specifically admitted to be true or otherwise specifically denied.

13. As an affirmative defense the Defendant alleges that on the 14th day of August 1958, the Plaintiff in the instant proceeding commenced an action in the Common Pleas Court of Seneca County, Ohio, praying for damages against the Defendant in the instant action. Such State Court proceeding was filed as No. 30057 and was commenced upon a petition, in all material respects, identical to the complaint filed in the instant case. Such state court action was dismissed pursuant to the following journal entry and judgment of the Common Pleas Court of Seneca County, Ohio entered on the 23rd day of June 1959:

It is Ordered that this matter be, and the same hereby is, dismissed otherwise than upon the merits, without the consent of the plaintiff, without prejudice [fol. 613] to a new action based upon the same subject matter, and for the reason that the Court does not have jurisdiction of the subject matter under the decision of the United States Supreme Court in San Diego Building Trades Council v. Garmon, 49 ALC 485. Exceptions saved to the plaintiff and defendants. Costs taxed to the plaintiff.

The State Court proceeding, journal entry and judgment described above is res judicata of and bars the prosecution of the instant case.

Wherefore defendant prays that the Second Amended Complaint of the plaintiff be dismissed; that the relief sought by plaintiff be denied and that defendant recover its costs herein.

Law Offices of Jack Gallon,

By _____
Attorneys for Defendant.

[fol. 620]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Civil Action No. 8222

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY,
Route #2, Tiffin, Ohio, Plaintiff,

vs.

LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS UNION, an
affiliate of the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
Toledo 6, Ohio, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed January 26, 1962

Findings of Fact.

1. At the inception of the strike hereafter described, the Plaintiff had for many years been engaged in the trucking business in Tiffin, Ohio and he engaged, among other things, in general dump truck operations in which he used his own employees to operate a fleet of approximately 50 dump trucks which were used primarily in work on highway construction. For some years prior to the year 1956 Plaintiff's drivers were members of Local 625 of the Teamsters Union, and when that Union was merged into [fol. 621] the Defendant, those employees became members

of the Defendant, and were such members throughout the period of the strike in question. There was no contract between the Defendant and the Plaintiff prior to the strike in question.

2. In August of 1956, Plaintiff's drivers had met with representatives of the Defendant and had voted to strike in the event that the parties could not agree upon the terms of a contract. Plaintiff met with representatives of the Defendant on August 16, 1956, at the offices of the Defendant in Fremont, Ohio. No contract was concluded at that meeting and in the early morning of August 17, a large number of Plaintiff's drivers and representatives of the Defendant appeared at Plaintiff's garage and office premises in Tiffin and initiated the strike against the Plaintiff, which continued until October 5, 1956, when a contract was signed by the parties. That contract, Defendant's Exhibit D, was dated October 5, 1956, to expire March 1, 1959. At the time of the trial of this case in late April and early May of 1961, there was no contract between the parties.

3. Plaintiff's premises were struck by the Defendant on the 17th day of August, 1956, and, on August 21, 1956, pursuant to motion filed by Plaintiff in connection with the petition filed in the Common Pleas Court of Seneca County, Ohio, by the Plaintiff herein against the Defendant herein and certain business agents and members of the Defendant, that court issued a restraining order "restraining the individual defendants and each and all of them, and all persons associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

"1. * * *

[fol. 622] "2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representatives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, ob-

structing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

"3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent any of plaintiff's customers or any other members of the public from having business relations with the plaintiff.

"4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

"5. . . .

"6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business or any part thereof.

"7. . . .

"8. . . ." (Plaintiff's Exhibit 2).

4. From and after the issuance of the aforesaid restraining order, Defendant observed the requirements of paragraph 6 above, in that it thereafter confined its number of pickets at each entrance to the Plaintiff's place of business to two. At no time during the strike period, to wit, August 17, 1956 to October 5, 1956, both inclusive, was violent conduct engaged in.

[fol. 623] 5. The Plaintiff's contract to haul all of Seneca County's requirements of stone for surface treatment of the County's hardtop roads was terminated August 17, 1956 by Seneca County Engineer William Heim as a result of his learning from his road superintendent of Defendant's strike against the Plaintiff. This termination occurred several days prior to the date Defendant's business agent Lawrence Evans called upon said county engineer and advised him of Defendant's strike against the Plaintiff. The unlawful activities of the Defendant, hereafter described, had nothing to do with the decision of the said

county engineer to terminate said contract. The damages Plaintiff suffered as a result of the termination of said contract, \$2,675.33, were too remote to be considered in the computation of damages herein.

6. (a) One of Plaintiff's source of materials at the time of Defendant's strike against him was the sand and gravel pit of the France Stone Company at Bloomville, Ohio, approximately 8 to 10 miles from Plaintiff's garage terminal.

(b) During the course of the said strike and in violation of the restraining order referred to in paragraph 3, supra, the Defendant encouraged the employees of the France Stone Company at its Bloomville sand and gravel pit to engage in a concerted refusal to load Plaintiff's trucks or perform other services for the Plaintiff for the purpose of requiring the France Stone Company to cease doing business with the Plaintiff and for the purpose of forcing or requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of the Plaintiff's employees.

7. (a) One of Plaintiff's customers at the time of the Defendant's strike against him was the Louis O'Connel Coal Co. of Tiffin, Ohio, which customer engaged in the [fol. 624] business of making ready-mix concrete. At the time of the strike, Plaintiff had a contract with the O'Connel company requiring and permitting the Plaintiff to haul all of such customer's requirements of sand and gravel for such ready-mix concrete manufacturing operation.

(b) During the course of Defendant's strike against the Plaintiff, the Defendant encouraged the employees of the O'Connel company to engage in a concerted refusal to use Plaintiff's trucks for the purpose of forcing or requiring the O'Connel company to cease doing business with the Plaintiff and for the purpose of forcing or requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of Plaintiff's employees.

(c) During the same strike, the Defendant also contacted the management of the O'Connel company directly

and advised it of the strike against the Plaintiff and asked the cooperation of the O'Connel company management in connection with such strike.

(d) As a result of Defendant's aforesaid activity, the O'Connel management ceased doing business with the Plaintiff for the duration of the strike.

8. (a) At the time of Defendant's strike against the Plaintiff, Launder & Son, Inc. of Toledo, Ohio, a general highway contractor, was engaged in constructing the bypass of U. S. Route 20 around Fremont, Ohio and Plaintiff, under a subcontract with Launder & Son, Inc. was doing all of the batching on such project, i.e., transporting by truck all of the dry ingredients such as sand, gravel and cement from a stockpile to a self-propelled cement mixer that mixed and laid the concrete for the highway.

(b) During the course of the strike and in violation of the restraining order referred to in paragraph 3, supra, [fol. 625] Defendant contacted the management of Launder & Son, Inc. and asked that the Plaintiff's trucks not be permitted to work on such job during the strike.

(c) As a result of the Defendant's request, Launder & Son, Inc. ceased doing business with the Plaintiff and Plaintiff did not work on such construction job after August 22, 1956, until the strike had been terminated.

9. (a) At the time of Defendant's strike against the Plaintiff, C. A. Schoen, Inc. of Toledo, Ohio manufactured asphalt paving material and was purchasing all of its requirements of sand by using Plaintiff as the hauler of that sand.

(b) During the course of the strike, Defendant encouraged the employees of C. A. Schoen, Inc., to engage in a concerted refusal to unload Plaintiff's trucks or perform other services for the Plaintiff for the purpose of requiring C. A. Schoen, Inc. to cease doing business with the Plaintiff and for the purpose of requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of Plaintiff's employees.

(c) During the same strike and both before and after the issuance of and in violation of the restraining order referred to in paragraph 3, supra, the Defendant also contacted the management of C. A. Schoen, Inc. directly and asked such management to cease doing business with the Plaintiff.

(d) The Defendant was successful in its efforts to cause C. A. Schoen, Inc. to cease doing business with the Plaintiff until the issuance of said restraining order and continued its efforts, unsuccessfully, thereafter.

10. During the course of the strike, Defendant caused some of Plaintiff's employees who did go to work and [fol. 626] drive Plaintiff's trucks, to be followed in automobiles by Defendant's agents and striking members. This activity had the result of discouraging return to work by an employee who did not want to drive one of Plaintiff's trucks and get followed or get hurt. Accordingly, this activity made the strike of the Defendant against the Plaintiff more effective to prevent Plaintiff's employees from returning to work than it would have been but for such activity.

11. (a) At the time of the strike, Wilson Sand & Gravel Co. of Upper Sandusky, Ohio was supplying sand to the V. N. Helderman Co. for its job of constructing a bypass of U. S. Route 25 around Findlay, Ohio and Plaintiff had an agreement with the Wilson Sand & Gravel Co. entitling Plaintiff to haul all of such sand from the Wilson pit near Upper Sandusky, Ohio to the construction site near Findlay, Ohio.

(b) As a result of the combination of lawful and unlawful strike activity of the Defendant, Plaintiff had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson Sand & Gravel Co., and the sand that Plaintiff was accordingly unable to haul was hauled by other truckers who were obtained by the Wilson Sand & Gravel Co.

12. The special damages suffered by Plaintiff for which he should be awarded a judgment for compensatory damages herein total \$19,619.62.

13. The acts of the Defendant described at paragraphs 6 (b), 7 (b), 7 (c), 8 (b), 9 (b), 9 (c) and 10, supra, had the objective of bringing the Plaintiff to his knees and were done intentionally, maliciously and with wanton disregard of the legal rights of the Plaintiff and others.

[fol. 627] 14. The Plaintiff should be awarded a judgment for punitive damages herein in the amount of \$15,000.00.

Conclusions of Law.

1. On the basis of the pleadings and the entire evidence, the Plaintiff's claim that Defendant engaged in secondary activity unlawful under 29 U. S. C. A., Section 187, raises or presents a substantial federal question and consequently the Court has jurisdiction to adjudicate such claim.

2. The material and operative facts supporting the Plaintiff's federal claim of unlawful secondary activity are substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity.

3. The claim of unlawful secondary activity violative of 29 U. S. C. A., Section 187, and unlawful secondary activity violative of the common law of Ohio are not separate causes of action but are merely different grounds to support a single cause of action, the cause of action being the violation by the Defendant of Plaintiff's right to be free of unlawful interference with his business.

4. By reason of Conclusions 1, 2 and 3 above, the Court has jurisdiction of the non-federal claim of unlawful secondary activity violative of the common law of Ohio, under the doctrine of *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 86 and *UMW v. Meadow Creek Coal Co.*, 263 F. (2) 52, cert. den., 359 U. S. 1013, and may award compensatory and punitive damages under such common law as well as under the aforesaid federal law.

5. The activities of the Defendant described in Findings of Facts paragraphs Nos. 6 (b), 7 (b) and 9 (b) violated [fol. 628] 29 U. S. C. A., Section 187, and the activities of the Defendant described in Findings of Facts paragraphs Nos. 6 (b), 7 (b), 7 (c), 8 (b), 9 (b), and 9 (c) violated

the Ohio common law regarding unlawful secondary activity and compensatory and punitive damages may be awarded to the Plaintiff accordingly.

6. As the result of the Defendant engaging in both lawful and unlawful strike activity against the Plaintiff between August 17 and October 5, 1956, the totality of Defendant's efforts may be considered and damages may be awarded the Plaintiff based upon all loss suffered as a result of Defendant's unlawful strike activity against the Plaintiff and as a result of Plaintiff's having fewer truck driving employees working during the strike than he would have had but for the combination of Defendant's lawful and unlawful strike activity against the Plaintiff.

Frank L. Kloeb, United States District Judge.
Toledo, Ohio.

[fol. 629]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION
No. 8222 Civil

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY,
Route No. 2, Tiffin, Ohio, Plaintiff,

vs.

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION, an
Affiliate of the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
435 South Hawley Street, Toledo 6, Ohio, Defendant.

OPINION OF THE COURT

(Filed December 26, 1961, C. B. Watkins, Clerk,
U. S. District Court, N. D. O.)

Kloeb, J.

Under date of December 16, 1960, plaintiff filed his second amended complaint in which he alleges, in effect, the

following: That this action arises under the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. A. 145; that complainant is engaged in the trucking business as a sole proprietor under the name of Lester Morton Trucking Company, at Tiffin, Ohio, and that defendant is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; that, [fol. 630] on the 17th day of August, 1956, at about 5:30 o'clock A. M., the defendant wilfully, maliciously and in pursuance of a conspiracy to injure, damage and destroy complainant's trucking business, caused approximately fifteen men to appear at the complainant's business premises and to picket said place of business with signs or banners, and that the aforesaid picketing by large numbers of men was caused to continue until August 21, 1956, on which date an injunction against picketing by more than two men at each entrance was issued by the Common Pleas Court of Seneca County, Ohio, and that said picketing by large numbers of men continued in violation of said injunction, and with the knowledge of and under the instructions of the defendant; that defendant unlawfully obstructed and interfered with complainant's right to freely engage in his normal business activities by wilfully and maliciously threatening various persons and corporations with which the complainant had contractual relations with picketing at their construction sites if they continued to do business with complainant; that defendant further unlawfully obstructed and interfered with complainant's right to freely engage in his normal business activities by inducing and encouraging, and attempting to induce and encourage, certain employers and the employees thereof, having contractual business relations with the complainant, to engage in a concerted refusal to continue such contractual business relations with complainant, and to force and require the complainant to recognize and bargain with the defendant, who was not certified as the representative of the employees of the complainant; that defendant further unlawfully obstructed and interfered with complainant's rights by wilfully and maliciously inducing and encouraging the employees of other employers to engage in con-

certed refusals in the course of their employment to perform services, all for the purpose of forcing and requiring [fol. 631] such employers to cease doing business with the complainant; that the mass picketing and secondary boycott activities engaged in by the defendant against the complainant were in violation of the provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A. 145, and caused great damage to the complainant in that, among other things, (1) He lost numerous trucking jobs as a result thereof from which he would have received substantial profits but for said mass picketing and secondary boycott activities; (2) Numerous other jobs under contract by the complainant were delayed; and (3) Nearly all of complainant's trucking equipment was forced to remain idle during the aforesaid period of time.

Wherefore, complainant prays judgment against the defendant in the amount of \$50,000.00 as compensatory damages and \$50,000.00 as punitive damages.

In due course, defendant filed its answer, in which it generally denied the allegations of the second amended complaint.

It appears that the plaintiff had, for many years, been engaged in the trucking business in Tiffin, Ohio, and that he engaged, among other things, in general dump truck operations in which he used his own employees to operate a fleet of approximately fifty dump trucks which were used primarily in work on highway construction; that for some years prior to the year 1956 plaintiff's drivers were members of Local 625 of the Teamsters Union, and when that Union was merged into the defendant these employees became members of the defendant, and were such members throughout the period of the strike in question; that there was no contract between the defendant and the plaintiff prior to the strike in question.

It appears further that, in August of 1956, after plaintiff's drivers had met with representatives of the defendant [fol. 632] and had voted to strike in the event that the parties could not agree upon the terms of a contract, plaintiff met with representatives of the defendant on August 16, 1956, at the offices of the defendant in Fremont, Ohio;

that no contract was concluded at that meeting, and that, in the early morning of August 17, a large number of plaintiff's drivers and representatives of the defendant appeared at plaintiff's garage and office premises in Tiffin and initiated the strike against plaintiff, which continued until October 5, 1956, when a contract was signed by the parties; that said contract (Defendant's Exhibit D) was dated October 5, 1956, to expire March 1, 1959; that, at the time of the trial of this case in late April and early May of this year, there was no contract between the parties and apparently there is none at this date.

Plaintiff contends that the defendant engaged in unlawful strike activity during the strike when it encouraged the plaintiff's customers and suppliers, sometimes through their employees and sometimes directly, to stop doing business with the plaintiff; that, since the defendant engaged in unlawful activities against plaintiff, plaintiff is entitled to collect all damages he suffered as a result of defendant's total strike activity; that defendant violated both Federal statutory law and State common law, and that this Court, therefore, has jurisdiction to award damages.

Section 303 of the Labor Management Relations Act of 1947, 29 U. S. C. A., Sec. 187, during the period complained of, provided, in part, as follows:

"(a) It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . or to perform any services, where an object thereof is:

[fol. 633] "(1) forcing or requiring any employer . . . to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . .;

"(b) Whoever shall be injured in his business or property by reason of any violation of sub-section (a) of this section may sue therefor in any district court in the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The unlawful secondary boycott by way of making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer, which plaintiff complains of, is predicated upon several Ohio cases, and particularly the case of *Moores & Co. v. Bricklayers' Union et al.*, 10 Ohio Decisions Reprint 48 (affirmed by the Supreme Court of Ohio, 51 O. S. 65), and the case of *Schmidt Packing Co. v. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America et al.*, 48 ALC 547 (1947), and particularly the case of *W. E. Anderson Sons Co. v. Local 311, Teamsters, etc.*, 156 O. S. 541; also upon 33 Oh. Jur. 2, Labor, Sec. 64, Secondary Boycott, pages 187-188.

The right of recovery for damages for the common law tort of conspiracy is based upon the case of *Perko v. Local 203, etc., et al.*, 168 O. S. 161 (1958).

[fol. 634] Plaintiff relies upon the case of *Carpenters Union v. Cisco*, 266 Fed. (2d) 365 (cert. den. 361 U. S. 828), in his claim that he may recover damages measured by all of the revenue lost as the result of the entire strike activity of the defendant. In other words, he relies upon the "totality effort" rule.

In his claim of jurisdiction in this Court, as well as his right to rely upon the common law of the State, in addition to the Federal statute, plaintiff relies upon *United Mine Workers of America v. Meadow Creek Coal Co.*, 263 Fed. (2d) 52 (cert. den. 359 U. S. 1013), and *United Mine Workers of America v. Osborne Mining Co.*, 279 Fed. (2d) 716 (cert. den. 364 U. S. 881, 1960), and, in addition thereto, the common law of Ohio with respect to punitive damages as set forth in 16 Oh. Jur. 2d, Damages 281, Sec. 145 (Tort Actions, Generally), which reads, in part, as follows:

"It is an established principle of law in Ohio that in actions to recover damages for tort, which involve the ingredients of fraud, malice, or insult, or the wanton or reckless disregard of the legal rights of others, the jury may go beyond the rule of mere compensation of the party aggrieved, and award exemplary or punitive damages. . . ."

Plaintiff concedes that, to the extent that it was peaceful and non-massive, the picketing that occurred at the plaintiff's garage at Tiffin was lawful. He concedes that, if the defendant had limited itself to that type of lawful activity, plaintiff would not be entitled to recover any damages from the defendant. Plaintiff contends, however, that the defendant engaged in substantial unlawful activity during the period of the defendant's strike against the plaintiff, and that it is impossible to distinguish between the damages plaintiff suffered as the result of defendant's lawful [fol. 635] activity on the one hand and the defendant's unlawful activity on the other.

Plaintiff's premises were struck on the 17th day of August, 1956, and, on August 21, 1956, pursuant to motion filed by plaintiff in connection with the complaint filed in the Common Pleas Court of Seneca County, Ohio, that Court issued a restraining order "restraining the individual defendants and each and all of them, and all persons associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

"1. . . .

"2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representatives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, obstructing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

"3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intima-

tion or threats, preventing or attempting to prevent any of plaintiff's customers or any other members of the public from having business relations with the plaintiff.

"4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

"5. . . .

"6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business or any part thereof.

[fol. 636] "7. . . .

"8. . . ."

(Plaintiff's Exhibit 2.)

We conclude, from the evidence, that, from and after the issuance of the aforesaid restraining order, defendant observed the requirements of paragraph 6 above, in that it thereafter confined its number of pickets at each entrance to the plaintiff's place of business to two. We further conclude from the record that, at no time during the strike period, to wit, August 17, 1956, to October 5, 1956, both inclusive, was violent conduct engaged in.

The defendant contends that the primary strike and picketing at plaintiff's premises was not in violation of Section 303 of the Labor Management Relations Act of 1947; that it engaged in no illegal conduct with respect to the secondary or neutral employers; that inducements of individual employees do not violate Section 303 of the Act; that the picketing at France Stone Co. and Schoen Asphalt Paving Co. was primary and lawful, and that the evidence does not establish an inducement of the employees of these two concerns; that the pre-emption doctrine is an affirmative one, and that exclusive jurisdiction is vested in the National Labor Relations Board; that the pre-emption doctrine applies to conduct allegedly constituting a common law secondary boycott, and that in this case neither Federal nor State Courts have jurisdiction to award damages;

that since no evidence of mob action is involved in this case the decisions heretofore cited, to wit, the *United Mine Workers of America v. Meadow Creek Coal Co.*, *supra*, and the *United Mine Workers v. Osborne Mining Co.*, *supra*, are inapplicable, that the defendant engaged in no conduct which violated the State Court restraining order, and that this Court should not, for various reasons, exercise authority to award punitive damages.

[fol. 637] The defendant poses the following three questions as being the questions involved in this suit:

1. Whether the Union engaged in conduct which violates Section 303 of the Labor Management Relations Act of 1947;

2. Whether the Court has jurisdiction to entertain a claim for relief predicated upon an alleged common law secondary boycott;

3. Whether, in the circumstances of this case, punitive damages should be assessed against the Union.

The illegal acts complained of by plaintiff revolve around the France Stone Company, the Louis O'Connell Coal Company, the Launder & Son, Inc., and the C. A. Schoen, Inc. In addition thereto, the contracts involved those at the Wilson Sand & Gravel Co., and also the Seneca County contract.

During the trial of the case, which was tried to the Court, plaintiff's witness, William H. Heine, the Seneca County Engineer from Tiffin, Ohio, testified in connection with the contract that the County had with the Plaintiff for the hauling of stone for hardtop roads. He testified that Mr. Morton performed under the contract until August 17, 1956, and that, some time thereafter, Lawrence Evans, Business Agent of defendant, called at his office and asked him if he knew that a strike had been declared against Morton, and he replied that he did. However, on cross-examination, he stated that he had made the decision to discontinue with Morton several days before he was visited by Mr. Evans.

*On the basis of this testimony, we concluded that the alleged unlawful activities of the defendant had nothing

to do with the decision of the County Engineer to terminate [fol. 638] the hauling contract with Morton, and that the damages claimed were too remote to be considered in any computation of damages. We sustained a defense motion to dismiss this claim and we, therefore, give it no further consideration.

In connection with the Wilson Sand & Gravel Co. contract, at the trial of the case we were concerned with the possible pertinency of the failure of plaintiff to perform under the contract to the conduct of the defendant of its strike, but we believe that, under the totality of effort rule, alleged damages in connection with this contract should be considered.

We believe that the acts of the defendant in connection with the France Stone Co., where Lawrence Evans, Business Agent of the defendant, took men who were striking against the plaintiff with picket signs to the premises of the France Stone Company and there set up a picket line was wrong. Plaintiff's Exhibit 13, a photograph taken by plaintiff on either the 23d or the 24th day of August, 1956, some two or three days after the issuance of the restraining order by the Common Pleas Court of Seneca County, establishes, beyond refutation, that the France Stone Company was picketed. The testimony of an employee of plaintiff, one John W. Combs (Record, p. 113), that, about a week after the strike commenced, he and his brother Joe were taken to the France Stone Co. by defendant's officer Evans corroborates the Exhibit 13. That these pickets were viewed by the employees of plaintiff, as well as the France Stone Co., is well established. The activities of defendant's agent Evans in contacting employees of the France Stone Co. is established.

We believe that the activity of defendant's agent at the France Stone Co. was unlawful under Section 303 and was an apparent effort to injure and coerce the plaintiff.

[fol. 639] In connection with the O'Connel Coal Co., which had been a customer of plaintiff for a number of years, it was the plaintiff's duty under the contract to haul all of the O'Connel Company's requirements of sand and gravel into its Tiffin plant for use in its ready-mix concrete manufacturing operation.

Here, through the activities of one Kenneth Lidster, an employee of the Coal Co., and a steward of the defendant local, and through the activities of Irvin Mowery, Business Agent of the defendant, the O'Connel people were alerted to the strike. Contacts were made with this company by Mowery by telephone, as well as by personal visits.

We believe that Section 303 was violated in that the defendant encouraged the employees of the O'Connel Company to stop using plaintiff's trucks for the purpose of forcing or requiring the O'Connel Company to cease doing business with the plaintiff; that defendant's activity in connection with this company was unlawful under the common law of Ohio.

In connection with the Launder & Son, Inc., contract, plaintiff had a contract to transport the "batching" by truck to and at the site of a highway improvement that the Launder & Son Company was engaged in constructing. Here defendant's Business Agent Evans took strikers to the Launder job and, while there, talked to a boss on the Launder job, and asked him not to let any of plaintiff's trucks work there.

In connection with the C. A. Schoen, Inc., company, defendant's Business Agent Evans, together with some of the strikers, followed trucks of plaintiff to a stone quarry and then followed the trucks to Toledo to the premises [fol. 640] of the Schoen company, where picketing was set up, where following conversation with defendant's Business Agent Sullenger, Schoen refused to permit the sand transported by plaintiff to be received. Other activities in connection with Schoen were along the same general lines. We believe that these activities were in violation not only of the Federal statute but the State common law.

In the course of the trial, Irvin Mowery was the first witness called by plaintiff. He testified that he was an organizer for Local 20, and that Sullenger, Evans and Reagan also worked out of the Toledo office; that on the morning of the strike, he observed Evans there and that there were around thirty of Morton's employees and three pickets on duty; that he went to the O'Connel Company the next day after the start of the strike, where the O'Connel em-

ployees were members of the defendant local; that he talked to their steward there and that, thereafter, he visited the O'Connel company once a week; that he talked with Howard Magers, Junior, President of the O'Connel company, three or four days before the strike and told him of the possibility of a strike, and at strike time he called Mr. Magers on the telephone and asked him his cooperation.

John W. Combs testified that he worked for plaintiff in 1956, and that he belonged to the defendant local; that, on the first day, he stood picket at 8:00 A. M. and around 25 men were out there; that he appeared again the next day and that the same number of men were there, and that when the Court order issued 6 or 8 were there at any one time; that he went out to the France Stone Company with his brother under the direction of Mr. Evans and there set up a picket with signs; that Evans took him and his brother Joe to Fremont where the by-pass of Route 20 was being constructed by the Launder Company, [fol. 641] and that Evans told the man at the gate not to let Morton's trucks in, and the man responded "I would like to go along with you"; that he and his brother and James Marcum, together with Evans, followed three of Morton's trucks as they came out empty at 9:00 A. M. to Maple Grove quarry five miles north of Tiffin where the trucks were loaded with No. 8 sand, and that they then followed the trucks into Toledo to the Schoen Asphalt Company where Evans talked with someone, and the trucks were not unloaded; that the drivers of the trucks left in a car, and that he and his brother got out with a picket sign along with James Marcum and placed themselves at the entrance. On cross-examination, he testified that after the Court order had issued the number of pickets at the entrances was reduced to 4.

Hubert Olds testified that he was a mechanic at the France Stone Company and a member of the operating engineers' Union; that a teamsters' Union man talked with the Plant Superintendent, C. C. Robinson, and himself.

Witness Vernon Beam testified that he and Stokes and Cliff Smith took three trucks to the Dolomite quarry and loaded them with sand, and that they were followed by

Evans, accompanied by Joe and John Combs; that they pulled into Schoen Asphalt just a few seconds after the trucks arrived; that Evans went into the office and that the Schoen Superintendent came out and "told us we couldn't unload"; that no trucks were unloaded and that "we left with Mr. Morton in his car"; that at the Schoen gates he saw two picket signs on each side of the entrance; that the Project Engineer at the by-pass on Route 20 "told us to take our trucks off the job after Larry Evans came out of the office."

[fol. 642] Witness Charles Robinson testified that he drove into the France plant where he was employed as a Plant Manager; and saw the men at the entrance with picket signs, and that a fellow then came in in a black Cadillac.

Howard Stultz testified that he worked for plaintiff in 1956, but that he is not now working for plaintiff; that his position was that of a mechanic, and that he drove a truck for plaintiff in August of 1956; that he worked as a mechanic in the garage until the third or fourth day of the strike when he hauled sand to Schoen Asphalt in Toledo from the Dolomite quarry; that he saw men standing around a car talking, but saw no signs; that a man came out of the office and "told us to leave the truck unloaded"; that when he left the men were still at the gate; that he drove ~~into~~ the France Stone Company during the strike and saw a sign there at least two days indicating "Morton Company on strike"; that he saw the two Combs' boys and Nye with the signs.

Elmer Luttrell testified that he was employed by Launder & Sons in 1956 as Field Office and Batch Plant Manager; that his employer was paving Route 20 by-pass; that they were using Morton's dump trucks and batch trucks, and that he was informed by Mr. Launder of the Morton strike; that after the strike three of Morton's trucks appeared for a short period of time; that Larry Evans "called me and asked if Morton's trucks were on the job".

Kenneth Lidster testified that he worked for the O'Connell Company in 1956, making ready-mix; that he drove a truck, and that the plaintiff "hauled our sand and I then belonged to Local 20"; that Irvin Mowery, one of defendant's Business Agents, called to see him, and that Mowery said they had a strike on Morton and he would just as

[fol. 643] leave "we didn't use his trucks"; that "I told our boss Howard Magers".

Howard Magers, Jr. testified that Kenneth Lidster "our Union Steward" informed me that Morton had been struck and he had been so informed by a teamster.

James Schoen testified that he was a paving contractor, Treasurer of Schoen Asphalt, and that Morton supplied sand in 1956; that, on August 20, he saw a sign at his entrance "Morton's strike", and that there were people around; that he talked to Ed Sullenger, Business Agent of defendant, and Sullenger "told us we could not and should not deal with Morton on strike; that the trucks should remain unloaded"; that he further had two conversations in his office with Sullenger, "when he tried to persuade us not to do business with Morton"; that he had other conversations over the telephone with Sullenger, all occurring within a week after the strike commenced, all "trying to persuade us not to use Morton's sand"; that a Mr. Evans also joined with Sullenger in the first conversation, but that he could not identify Evans.

Ransom Taulbee testified that he worked for plaintiff in 1956; that he did not work during the strike, the reason was he did not want trouble, and that some trucks left plaintiff's during the strike, and that the trucks that left were followed by Evans and others; that he did not want to take a truck out and get followed or get hurt. On cross-examination, he testified that he saw Evans follow trucks more than once.

We have reviewed here some, but not all, of the activities engaged in by the defendant, through its Business Agents, in contacting suppliers and others that were doing business with the plaintiff in an apparent effort to discourage further [fol. 644] their business with plaintiff, and to injure the plaintiff in the operation of his business. Some of these activities, unfortunately, were engaged in after and in the face of the restraining order issued by the Common Pleas Court of Seneca County on the 21st day of August, 1956. Some of the contacts made by defendant's agents were made with employees of plaintiff's suppliers and companies with which the plaintiff was doing business, and

some of the contacts were made with managers or superintendents or officers of these companies. All of them, apparently, had the same purpose in mind.

Looking at the picture as a whole, we conclude that the special damages suffered by plaintiff in connection with the Launder matter amounted to the sum of \$8,684.92, in connection with the O'Connel Company in the amount of \$1,644.79, and in connection with the Wilson Company in the amount of \$9,289.91, for a sum total of \$19,619.62. Compensatory damages, therefore, in the sum of \$19,619.62 are awarded.

Coming to the question of punitive damages, we believe that some punitive damages should be awarded. The conduct of defendant, through its agents, constituting secondary activity was in violation not only of the Federal statute but of the common law of Ohio relative to secondary boycotts and conspiracy. Some of this activity, in violation of the restraining order of the Common Pleas Court of Seneca County, is regrettable.

Although the punitive damages awarded in the Meadow Creek and the Osborne cases, *supra*, were predicated substantially upon the extreme violence that pervaded the strikes, we see no reason why the award of punitive damages should be limited to cases where violence is engaged in. Here the objective was to bring the plaintiff to his [fol. 645] knees, and the means employed were unlawful. An award of \$15,000.00 as and for punitive damages is assessed.

In the course of our consideration of this case, we have not only studied and considered the cases of the United Mine Workers and the Osborne Company, *supra*, but also, in particular, the following cases: Local Union No. 984, *etc. et al. v. Humko Company, Inc., etc. et al.*, 287 Fed. (2d) 231 (Cert. Den. 1961); Carpenters Union, Local 131 *et al. v. Cisco Construction Co., etc.*, 266 Fed. (2d) 365 (Cert. Den. 361 U. S. 828), and the case of United Brick & Clay Workers of America *et al. v. Deena Artware, Inc.* (6th Cir.), 198 Fed. (2d) 637, which is cited in the Cisco case, *supra*; also the case of William Gilchrist, Jr. *et al. v. United Mine Workers of America*, 290 Fed. (2d) 36 (Cert. Pending 12/14/61).

Plaintiff may, within fifteen (15) days, prepare and lodge with the Court Findings of Fact and Conclusions of Law drawn in accordance with this Opinion. Defendant may, within fifteen (15) days thereafter, note its exceptions or suggested additions thereto.

An order may be drawn accordingly.

Frank L. Kloebe, United States District Judge.

Toledo, Ohio.

[fol. 646] In conformity with Rule 77 (d), F. R. C. P., please take notice that the following order or judgment was entered in this Court on January 26, 1962. C. B. Watkins, Clerk.

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,

WESTERN DIVISION.

No. 8222. Civil.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY,
Route No. 2, Tiffin, Ohio, Plaintiff,

vs.

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION,
an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers of Amer-
ica, Toledo 6, Ohio, Defendant.

JUDGMENT—January 26, 1962

This cause came on regularly and was tried by the Court without the intervention of a jury between the dates of April 24, 1961, and May 9, 1961, Plaintiff appearing by M. J. Stauffer and John R. Py, his attorneys, and Defendant appearing by Hugh Hafer and Jack Gallon, its attorneys;

Whereupon the Court having heard the evidence adduced and considered the briefs filed herein, and having rendered its opinion and entered findings of fact and conclusions of law;

[fol. 647] Now, Therefore,

It is adjudged that the Plaintiff have and recover from the Defendant the sums of \$19,619.62 as compensatory damages and \$15,000.00 as punitive damages for a total of \$34,619.62, together with his costs of this suit in the amount of \$490.44.

Dated this 26th day of January, 1962.

Frank L. Klobb, United States District Judge.

[fol. 649] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14984

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

LESTER MORTON, d/b/a Lester Morton Trucking Company,
Plaintiff-Appellee,

v.

LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS UNION,
an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers of
America, Defendant-Appellant.

OPINION—July 25, 1963.

Before: O'SULLIVAN, Circuit Judge, BOYD and THORNTON, District Judges.

THORNTON, District Judge. Plaintiff filed this action in the district court seeking damages on account of a secondary boycott against it. The primary strike commenced

August 17, 1956 and continued until October 5, 1956. Plaintiff claims that defendant's activities were unlawful within the purview of § 303 of the Labor Management Relations Act of 1947, 29 U. S. C. A. § 187, as well as being unlawful under the common law of the State of Ohio.

District Judge Kloeb, by his findings of fact and conclusions of law filed separately from his opinion, found that defendant had engaged in unlawful secondary activity that was violative of § 303 and also of the common law of Ohio. He awarded \$19,619.62 compensatory damages plus \$15,000.00 punitive damages.

[fol. 650] The questions raised by appellant-defendant on this appeal have been resolved on one or more prior occasions by the Supreme Court of the United States or by this court. Defendant seeks to distinguish this case from those that have preceded it in the various particulars upon which it bases its argument for reversal.

I. Jurisdiction Where Federal Claim Joined With Non-Federal Common Law Tort Action

Defendant contends that a federal court is without jurisdiction to entertain a suit for damages based on a secondary boycott unlawful under state law even though the suit also seeks damages under § 303 for an unlawful secondary boycott. This contention is directly contrary to the holding in the 1933 decision of *Hurn v. Oursler*, 289 U. S. 238, as well as that in a number of recent cases decided by this court. Included among these are *Flame Coal Company v. United Mine Workers of America*, 303 F.2 39 (6 Cir., 1962); *White Oak Coal Company v. United Mine Workers of America*, decided May 24, 1963, — F.2 — (6 Cir.); *United Mine Workers of America v. Meadow Creek Coal Company*, 263 F.2 52 (6 Cir., 1959), certiorari denied, 359 U. S. 1013; and *United Mine Workers of America v. Osborne Mining Co.*, 279 F.2 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887. Defendant contends that since there was no violence in the instant case a different rule applies. We are not aware of such a distinction and in fact are unable to appreciate any legal or logical reason for such a jurisdictional distinction. No decided case has been called to our attention in support of this

contention by defendant. Another aspect of this argument advanced by defendant is that if the state court could not have entertained this suit for damages under state common law because of pre-emption by federal law there can be no recovery here. This contention is disposed of adversely to defendant by the holdings in the five cases above cited. The holdings in these cases permit joining federal and nonfederal grounds in support of a cause of action. A nonfederal cause of action is not extinguished because a state court is pre-empted by federal law from providing relief. We do not here decide that a state court is pre-empted from entertaining such a suit and awarding [fol. 651] damages. We make the observation that the Supreme Court on December 10, 1962 handed down a decision holding that a § 301 action was not subject to the pre-emption doctrine under *Garmon*.¹ *Smith v. Evening News*, 371 U. S. 195. It may be that the same considerations apply to a § 303 cause of action. See *Local 100 of the United Association of Journeymen and Apprentices v. Borden*, decided June 3, 1963, — U. S. —, footnote 3 of which reads as follows:

"49 Stat. 452, as amended, 28 U. S. C. §§ 157, 158. We do not deal here with suits brought in state courts under §§ 301 or 303 of the Labor Management Relations Act, 61 Stat. 156, 158, 29 U. S. C. §§ 185, 187, which are governed by federal law and to which different principles are applicable. See, e.g., *Smith v. Evening News Assn.*, 371 U. S. 195."

Is it not implicit in the above that state courts are not subject to the pre-emption doctrine insofar as *both* § 301 and § 303 are concerned?

II. Denial of Motion to Amend Answer

Prior to the trial date in the district court defendant asked for leave to file a motion to dismiss the amended complaint. Such leave was granted. The basis for the mo-

¹ *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

tion was set forth in defendant's memorandum in support thereof, namely, that a state court order dismissing plaintiff's action for the common law secondary boycott damages was res judicata and that such subject matter therefore could not be included in the instant suit in federal district court. The order of the state court reads as follows:

"It is Ordered that this matter be, and the same hereby is, dismissed otherwise than upon the merits, without the consent of the plaintiff, *without prejudice to a new action based upon the same subject matter*,* and for the reason that the Court does not have jurisdiction of the subject matter under the decision of the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 49 ALC 485. Exceptions saved to the plaintiff and defendant's costs taxed to the plaintiff."

[fol. 652] It is clear that the reason for its issuance was the doctrine of pre-emption. The state court's citation of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) was obviously for the purpose of indicating the authority upon which it relied in holding that state court jurisdiction was absent, not for the purpose of determining that jurisdiction was present in some other forum, a determination that may be made initially only by each forum for itself. It happens that the court in *San Diego* was concerned with the primary jurisdiction of the National Labor Relations Board to adjudicate the status of a disputed activity. The court there said that "(W)hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. It also said: "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate." *San Diego v. Garmon*, supra, 245-246. The Board has no power therefore to award compensation. Neither has the state court such power in an area of federal pre-emption. How-

* Italics supplied.

ever, Congress has provided a forum by virtue of 29 U. S. C. A. § 187 and this is completely independent of any National Labor Relations Board proceeding.² *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U. S. 237 (1952). The trial court denied this motion to dismiss. When the trial of this case began defendant again sought to present its res judicata contention by moving to amend its answer to add res judicata as an affirmative defense. This motion was denied by the trial court and such denial is here raised by defendant as constituting prejudicial error. We cannot agree. The granting or refusal of leave to amend is within the trial court's sound discretion. *Chesapeake & Ohio Railway Company v. Newman*, 243 F.2 804, 813 (6 Cir., 1957). We do not here find an abuse of such discretion. In view of the nature of this amendment and in the light of what we have said above in regard to the law applicable to the res judicata contention of defendant, such defense is without merit. Its exclusion did not constitute prejudicial error.

[fol. 653] III. Proof of Secondary Boycott

The findings of fact of the district judge as to secondary boycott activities violative of § 303 and of the state common law are amply supported by the evidence and are not clearly erroneous. *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 291. It would serve no useful purpose to here review the particular activities.

IV. Damages

That compensatory and punitive damages are recoverable for unlawful secondary boycott activities cannot be disputed. *Gilchrist v. United Mine Workers of America*, 290 F.2 36 (6 Cir., 1961), certiorari denied, 368 U. S. 75; *Flame Coal Company v. United Mine Workers of America*, 303 F.2 39 (6 Cir., 1962). That such damages are not capable of precise ascertainment does not preclude their

² One of the contentions advanced by appellant here is that the Board had exclusive jurisdiction of the subject matter of this controversy.

allowance. *United Mine Workers of America v. Osborne Mining Co.*, 279 F.2 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931). The basis upon which the lower court awarded compensatory damages in the amount of \$19,619.62 was a reasonable and justifiable one. There was evidence to support the award and the trial court's findings are not clearly erroneous. *Commissioner v. Duberstein*, supra. As to the punitive damage award of \$15,000.00, we cannot say that there was an abuse of discretion. The fact that the activities here engaged in did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable.

For the foregoing reasons the judgment below is affirmed.

[fol. 654]

JUDGMENT—Filed July 25, 1963

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Thomas P. Thornton, United States District Judge
(Sitting by Designation)

[fol. 655] Clerk's Certificate (omitted in printing).

[fol. 656]

SUPREME COURT OF THE UNITED STATES

No. 485—October Term, 1963

LOCAL 20, TEAMSTERS; CHAUFFEURS AND HELPERS UNION, etc.,
Petitioner,

vs.

LESTER MORTON, etc.

ORDER ALLOWING CERTIORARI—December 9, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 485

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION, an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,**

vs.

**LESTER MORTON, d/b/a LESTER MORTON
TRUCKING COMPANY,
Respondent.**

PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals
For the Sixth Circuit.**

**DAVID PREVIAINT,
DAVID LEO UELMEN,
212 West Wisconsin Avenue,
Milwaukee, Wisconsin,
Counsel for Petitioner.**

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No.

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION**, an Affiliate of the International Brotherhood of Team-
sters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

vs.

**LESTER MORTON, d/b/a LESTER MORTON
TRUCKING COMPANY,**
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review
the judgment of the United States Court of Appeals for
the Sixth Circuit entered in the above entitled case on
July 25, 1963.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court, printed
in Appendix A, *infra*, pp. 15-30, is reported in 200 F. Supp.
653. The opinion of the Court of Appeals, printed in Ap-
pendix B, *infra*, pp. 31-36, is unreported at this time.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix C, *infra*, p. 37, was entered on July 25, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the doctrine of preemption of labor disputes bars a federal court from exercising pendent jurisdiction to award actual and punitive damages based upon alleged violations of state common law where as here the alleged violations do not arise under Section 303 of the Taft-Hartley Act and where as here the doctrine of preemption bars state courts from awarding either actual or punitive damages based upon such alleged violations of state law.

2. Whether Section 303 of the Taft-Hartley Act authorizes an award of total actual damages for injury resulting directly from a lawful primary strike merely because the Union also engaged in other conduct which was found to be in violation of Section 303.

STATUTE INVOLVED.

The statutory provision involved is Section 303 of the Labor-Management Relations Act of 1947, 61 Stat. 158, 29 U. S. C., Section 187 (referred to as the "Act"). It is printed in Appendix D, *infra*, pp. 38-39. Although certain amendments to Section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 U. S. C., Sec. 187, such amendments are not germane to the questions presented in this petition.

STATEMENT.

This is a preemption case. The Petitioner, Local 20, Teamsters, Chauffeurs, and Helpers Union (referred to as "Local 20") is a labor organization and has its principal office in Toledo, Ohio (R. 121a, 126a).¹ Respondent, Lester Morton, d/b/a Lester Morton Trucking Company (referred to as "Respondent") is engaged in the operation of dump trucks and maintains his principal place of business in Tiffin, Ohio (R. 239a).

In this case the courts below have asserted jurisdiction under Section 303 of the Act, and awarded damages in the amount of \$1,600 based upon conduct found unlawful under Section 303. An additional \$9,300 damages were awarded "under the totality of effort rule" (R. 638a) even though Respondent has conceded that "there is no evidence of an unlawful activity in connection with" such loss (R. 210a-212a). Moreover the courts below have asserted "pendent" jurisdiction to award \$8,700 actual and \$15,000 punitive damages based upon "the Ohio common law regarding unlawful secondary activity" (R. 628a). Pendent jurisdiction over this state claim was asserted notwithstanding: (1) the finding that Local 20's conduct was at all times peaceful (R. 636a); and (2) the prior determination of the Ohio courts that such state courts had no jurisdiction to entertain Respondent's claim of common law secondary boycott (R. 610a). The facts giving rise to these startling results are set forth below.

(A. The Primary Strike.)

Local 20 represented Respondent's employees from 1950 until 1956 under an oral agreement (R. 33a-34a, 47a). During 1956 the Union, in an effort to secure a written

¹ The references are to the certified record filed in this Court.

agreement held a series of meetings with Respondent (R. 35a-36a, 41a-42a, 256a, 275a-278a, 357a-365a, 441a). During the course of these negotiations an impasse developed over Respondent's demand that any written agreement be conditioned upon Local 20 securing written agreements covering Respondent's competitors (R. 51a-52a, 57a, 359a, 361a-363a, 445a, 458a-459a, 499a-500a, 508a-510a, 586a-592a). This impasse precipitated a strike which commenced on April 17, 1956 (R. 239a, 256a) and terminated in early October, 1956 (R. 256a) when Respondent entered into a written contract with Local 20 (R. 275a-498a).

Local 20 engaged in peaceful picketing at Respondent's premises during the course of the strike (R. 41a, 65a, 86a, 432a-434a). There was no interference with ingress or egress at any time during the strike (R. 54a, 84a-85a, 87a, 432a), and no physical injury to person or property occurred (R. 54a-55a, 315a-318a, 622a, 636a). Some of Respondent's employees worked on the first day of the strike and continued to work through the strike (R. 106a-107a, 117a, 432a-434a, 500a). In addition new employees were hired during the strike (R. 435a).

(B. The State Common Law "Secondary Boycott".)

During the strike, Local 20 engaged in certain conduct which according to the District Court and the Court of Appeals, constituted a "secondary boycott" under the law of Ohio (R. 626a-628a; App. B, *Infra*, p. 36). The four suppliers or customers involved and the facts relating to each, as determined by the lower courts, are as follows.

(1. Launder Account.)

At the time of the strike Respondent was hauling ingredients for cement to be used in connection with a high-

way construction project. Respondent was performing this work under a subcontract from Launder & Sons, Inc. (referred to as "Launder") (R. 624a). During the course of the strike Local 20 requested the management of Launder to refrain from using Respondent's trucks (R. 624a-625a). As a result of this request Launder ceased doing business with Morton until the strike was ended (R. 625a). Damages in the amount of \$8,700² were awarded by the District Court (R. 644a) and this award was affirmed by the Court of Appeals.

(2. **O'Connell Account.**)

According to the courts below Local 20 requested the cooperation of the management of the Louis O'Connell Coal Co. (referred to as "O'Connell") and encouraged O'Connell's employees to engage in a concerted refusal to "use" Respondent's trucks for the purpose of causing O'Connell to cease doing business with Respondent (R. 624a). As a result, O'Connell ceased doing business with Respondent for the duration of the strike (R. 624a). Damages in the amount of \$1,600 were awarded by the District Court and this award was affirmed by the Court of Appeals (R. 644a, App. B, *infra*, p. 36).

(3. **France & Schoen Accounts.**)

The courts below also found that Local 20 encouraged the employees of France Stone Company (referred to as "France") and the employees of C. A. Schoen, Inc. (referred to as "Schoen") to engage in a "concerted refusal to load" Respondent's trucks for the purpose of requiring France (R. 623a) and Schoen (R. 625a) to cease doing business with Respondent. It is undisputed that there was no work stoppage or slowdown by either France (R.

² References to damages will be made in round figures.

71a, 89a, 90a, 104a, 126a, 134a) or Schoen (R. 94a-95a) employees. No damages were claimed (R. 180a, 475a) or awarded (R. 644a) in connection with the alleged inducement of the France and Schoen employees.

Compensatory damages of \$10,300 (Lauder \$8,700 and O'Connell \$1,600) and punitive damages in the amount of \$15,000 (R. 626a-627a, 644a-645a) were awarded by the District Court on the theory that Local 20 by the conduct set forth above "violated the Ohio common law regarding unlawful secondary activity" (R. 628a). The District Court's theory of liability and its award of damages were approved by the Court of Appeals (App. B, *infra*, p. 36). The District Court and the Court of Appeals thought it immaterial that: (1) Local 20's conduct giving rise to the claim of common law secondary boycott was peaceful (R. 644a; App. B, *infra*, p. 34), and (2) the state courts of Ohio had previously held that such state courts were without jurisdiction to award damages based upon Respondent's claim of common law secondary boycott (R. 440a; App. B, *infra*, p. 34).

(C. The Alleged Section 303 Violations.)

(1. O'Connell, France & Schoen Accounts.)

The courts below also concluded that Local 20's conduct in connection with France (no damages), Schoen (no damages) and O'Connell (\$1,600 damages) violated Section 303 of the Act. Viewed most strongly in Respondent's favor, the evidence with regard to O'Connell shows only that Local 20 advised its steward employed by O'Connell of the strike against Respondent and requested him to refrain from using Respondent's trucks (R. 152a). The steward had no occasion in the course of his employment to operate Respondent's trucks and had no authority to terminate Respondent's relation with

O'Connell (R. 154a-155a). Accordingly, the steward reported his conversation to the O'Connell management (R. 153a, 157a). Upon learning that a strike had been called against Respondent the O'Connell management arranged for other trucking services (R. 186a). There were no strikes, picketing or threats of strikes or picketing against O'Connell (R. 166a-167a).

(2. Wilson Account.)

Prior to the strike, Respondent was performing work for Wilson Sand & Gravel Co. (referred to as "Wilson"). Respondent conceded that there is "no evidence of an unlawful activity in connection with this particular job" (R. 210a-211a). It is undisputed that the Wilson work was lost for the duration of the strike because of a lack of drivers during the strike (R. 229a, 231a, 253a). Compensatory damages in the amount of \$9,300 were awarded because of the loss of revenue from Wilson. The District Court assessed these damages "under the totality of effort rule" (R. 638a). Although Local 20 devoted one-third of its brief in the Court of Appeals to an attack upon the "totality of effort rule" the Court of Appeals affirmed the District Court without addressing itself to this issue.

The opinion below represents an anomalous and unwarranted extension of liability under Section 303 of the Act; one which is in direct conflict with the previous decisions of this Court and of other state and federal appellate courts. If allowed to stand it will have a serious impact upon the administration of the Act. Hence, this Petition for Writ of Certiorari has been filed.

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Is Inconsistent With the Preemption Decisions of This Court and Is in Conflict With a Preemption Decision of the Tennessee Supreme Court.

It will be recalled that the Labor Management Relations Act of 1947 created union unfair labor practices. Section 8 (b) (4) of the Act provided that certain primary and secondary activities by a labor organization constituted an unfair labor practice. The National Labor Relations Board was given exclusive jurisdiction to remedy such practices. *Garner v. Teamsters Union*, 346 U. S. 485. Section 303 of the Act, repeating *hanc verba* the prohibitions set forth in Section 8 (b) (4)³ conferred a private right of action for damages against labor organizations which engage in conduct therein defined as unlawful. "[A]ny court having jurisdiction of the parties" is specifically authorized by Section 303 (b) to entertain such a suit.⁴ Thus, a state or federal court in a Section 303 action must determine whether the union has engaged in activities which are in violation of that Section. To this extent the adjudicatory process of the state or federal court is identical to that performed by the National Labor Relations Board under Section 8 (b) (4); and to that extent the doctrine of federal preemption (i. e. primary, exclusive jurisdiction of the Board) is inapplicable in damage actions brought pursuant to Section 303. *Cf. Atkinson v. Sinclair Refinery*, 370 U. S. 238, 245n.

³ *Longshoremen's Union v. Juneau Corp.*, 342 U. S. 237, 244; *NLRB v. Denver Bldg. & Construction T. Council*, 341 U. S. 675, 686.

⁴ As a result of the 1959 amendments to the Act, Section 303 merely incorporates by reference the prohibitions contained in Section 8 (b) (4).

Local 20 has not at any time and does not presently contend that the preemption doctrine is applicable to the adjudicatory process necessarily involved in the administration of Section 303 of the Act. Local 20 has consistently asserted, however, that once a federal or state court determines that certain peaceful conduct is not unlawful under Section 303 of the Act, such court is under the preemption doctrine without jurisdiction to award damages based upon the common law of the state in which the court sits.⁵ The contrary holding below is in direct conflict with this Court's preemption decision in *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 286, 91 N. W. 2d 663.

The plaintiff in *Baumgartners* case sued in state court for damages arising out of peaceful picketing at several construction job sites. The plaintiff in that case could have⁶ but did not invoke Section 303 of the Act; instead the plaintiff rested his claim squarely upon state law. Affirming an award of actual and punitive damages the South Dakota state supreme court rejected the union's claim of preemption. The South Dakota court, like the courts below, adopted the view that damages could be awarded for union conduct which violated state law regardless of the fact that the union's conduct was peaceful. This Court, citing its preemption decision *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236, reversed.

⁵ Compensatory damages in the amount of \$8,700 based upon the loss of the Launder account and \$15,000 punitive damages were awarded below solely on the theory that certain peaceful conduct by Local 24 constituted a common law secondary boycott. The relevant facts are set forth in the Statement of the Case, *supra*, p. 6 (R. 624a, 625a, 628a).

⁶ Construction job site picketing has given rise to a flood of litigation under both Section 8 (b) (4) and Section 303 of the Act. See e. g. *NLRB v. Denver Bldg. & Construction T. Council*, 341 U. S. 675.

Thus *Baumgartners* case plainly bars a damage action based upon state law where, as here, the union's conduct is peaceful. The fact that the state court in *Baumgartners* case could have entertained a damage action under Section 303 did not save it from reversal when it awarded damages under state law. And as noted in the *Garmon* case "the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." 359 U. S. at 245.

Recognizing and applying the preemption principles here urged by Local 20, the North Carolina Supreme Court in *Overnight Transportation Co. v. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, *cert. denied* 371 U. S. 862, recently disallowed \$500,000 punitive damages awarded under state common law principles.⁷ In *Overnight*, as here, the plaintiff invoked Section 303 of the Act, and the common law of the state. In *Overnight*, as here, there was no violence. In *Overnight* the Court held that the doctrine of preemption barred reliance upon state common law. The courts below in the instant case ruled contrariwise.

Rejecting Local 20's contention that preemption doctrine precluded consideration of state common law, the Court below expressed the view that violence *vis a vis* non-violence was irrelevant. In this regard the Court below stated, "No decided case has been called to our attention in support of this contention by [Local 20] (App. B, *infra*, p. 32). In the Court below Local 20 pointed out *inter alia* that "An examination of the legislative history of the Act reveals that the Congress expressly intended to exempt mob action and violence from the preemption doctrine

⁷ See also: *Pennsylvania Tidewater Dock Company v. National Maritime Union*, 206 F. Supp 764 (E. D. Pa.), where the court declined on the grounds of preemption to entertain a common law claim even though diversity of citizenship existed.

[*United Construction Workers v.*] *Laburnam*, 347 U. S. at 668-669" (Appellant's Br. p. 16). The refusal of the Court below to apply the well-established distinction drawn in preemption cases between violent and non-violent conduct is in direct conflict with not only *Laburnam* but also with *Youngdahl v. Rainfair*, 355 U. S. 131, 139-140.

The preemption doctrine, of course, applies with equal force to federal as well as state court proceedings. *San Diego Building Trades v. Garmon*, 359 U. S. 236, 245; *Weber v. Anheuser Busch*, 348 U. S. 468, 479. Nevertheless, the view expressed below—that federal courts exercising pendent jurisdiction possess *greater* jurisdiction than state courts insofar as *state law* is concerned—calls for separate comment. Local 20 in the court below and in this Court respectfully submits that when a federal court exercises either diversity or pendent jurisdiction, such federal court cannot assert jurisdiction with respect to state matters *unless* the state court could have asserted jurisdiction. *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 328; *Angel v. Bullington*, 330 U. S. 183, 191-192; *Woods v. Interstate Realty Co.*, 337 U. S. 535, 537-538. The contrary ruling below should not be permitted to stand.

B. The Courts Below Awarded Damages for Injury Proximately Caused by the Primary Strike Under the "Totality of Effort Rule;" This "Rule" Has Been Considered and Rejected by the District of Columbia Court of Appeals.

As set forth more fully in the opening section of this petition, *supra*, p. 7, the District Court awarded damages for financial losses proximately caused by a lawful, primary strike (i. e., the Wilson account). The court below without comment affirmed. The decision below is consistent with *Carpenters Local 131 v. Cisco Construc-*

tion Co., 266 F. 2d 365 (C. A. 9), cert. denied, 361 U. S. 828—the case in which the “totality of effort rule” was first announced. The Court of Appeals for the District of Columbia considered and rejected that “rule” in *Chauffeurs Local 175 v. NLRB*, 294 F. 2d 261, 262 (C. A. D. C.), stating:⁸

“But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere.”

In light of the “identity of language” (*Longshoremen's Union v. Juneau Corp.*, 342 U. S. 237, 244), between Section 303 and 8 (b) (4) of the Act, it is, we submit, of no moment that the *Local 175* case arose under Section 8 (b) (4) whereas the instant case arises under Section 303. A conflict over the interpretation of an important statutory policy has arisen. It should be resolved.

C. The Issues Involved in This Case Are of Great Importance to the Administration of the National Labor Relations Act.

Since Section 303 came into being in 1947, damages well in excess of \$3,000,000 have been awarded by state and federal courts (Appendix E, *infra*, p. 40). Over half of this grand total has been awarded in federal court proceedings in the Sixth Circuit. Importantly contributing to this unusual concentration of money judgments in the Sixth Circuit is its approval—in eight cases—of punitive damage awards. There is only one reported case, outside of the

⁸ With respect to the “totality of the effort rule,” the Seventh Circuit—although finding it unnecessary to make a definitive ruling—commented: “Some kind of a theory of ‘totality of efforts’ is . . . suggested whereby . . . incidents, by themselves lawful, become unlawful by an incident at some other location.” *Milwaukee Plywood Co. v. NLRB*, 285 F. 2d 325, 329 (C. A. 7).

Sixth Circuit, in which punitive damages have been awarded in a case arising under Section 303 (Appendix E, *infra*, p. 41).

Punitive damages are not authorized by Section 303 of the Act.⁹ In every case arising under Section 303 in which punitive damages have been awarded such damages have been predicated solely upon state common law. In each of these cases—*except the case at bar*—the award of punitive damages was based upon proven violence (App. E, *infra*, p. 41). Since Local 20's conduct was at all times peaceful, the award of punitive damages in this ~~case~~ represents an unprecedented departure from the established rules which heretofore controlled litigation under Section 303 of the Act. For as demonstrated in the first section of this petition, this Court has consistently held that absent violence the preemption doctrine bars an award of either actual or punitive damages based upon common law principles.

When punitive damages and the "totality of effort rule" are joined, as they were in this case, the liability imposed bears no resemblance whatsoever to the standard enacted by the Congress; namely that "Whoever shall be injured in his business or property *by reason of any violation of subsection (a)* . . . shall recover the damages by him sustained . . ." (Sec. 303 (b), Emphasis added.)

Moreover, by enacting Section 303, the Congress intended to assure "uniformity, otherwise lacking, in rights of recovery in the state courts . . ." *Laburnam*, 347 U. S. at 665-666. Yet under the decisions below, recovery of puni-

⁹ Congress did not contemplate an award of punitive damages when it enacted Sec. 303. See e. g.: *United Mine Workers v. Patton*, 211 F. 2d 742, 747-750 (C. A. 4), where the legislative history of Sec. 303 is reviewed. Cf. *Harvey Aluminum v. Longshoremen's Union*, 278 F. 2d 63 (C. A. 9).

tive damages depend upon the law of the state in which the case arises.

Sections 7 and 13 of the Act guarantee the right to strike, yet if the decision below stands, the cost of exercising that right may be too dear.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted:

Respectfully submitted,

DAVID PREVIAINT,

DAVID LEO UELMEN,
212 West Wisconsin Avenue,
Milwaukee, Wisconsin,
Counsel for Petitioner.

APPENDIX A.

In the
United States District Court
For the Northern District of Ohio,
Western Division.

Lester Morton, d/h/a Lester Morton
Trucking Company, Route No. 2,
Tiffin, Ohio,

Plaintiff,

vs.

Local 20, Teamsters, Chauffeurs and
Helpers Union, an Affiliate of the
International Brotherhood of
Teamsters, Chauffeurs, Warehouse-
men, and Helpers of America, 435
South Hawley Street, Toledo 6,
Ohio,

Defendant.

No. 8222. Civil.

Opinion of the Court.

(Filed December 26, 1961; C. B. Watkins, Clerk,
U. S. District Court, N. D. O.)

Kloeb, J.

Under date of December 16, 1960, plaintiff filed his second amended complaint in which he alleges, in effect, the following: That this action arises under the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. A. 145; that complainant is engaged in the trucking business as a sole proprietor under the name of Lester Morton Trucking Company, at Tiffin, Ohio, and that defendant is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; that, on the 17th day of August, 1956, at about 5:30 o'clock

A. M., the defendant wilfully, maliciously and in pursuance of a conspiracy to injure, damage and destroy complainant's trucking business, caused approximately fifteen men to appear at the complainant's business premises and to picket said place of business with signs or banners, and that the aforesaid picketing by large numbers of men was caused to continue until August 21, 1956, on which date an injunction against picketing by more than two men at each entrance was issued by the Common Pleas Court of Seneca County, Ohio, and that said picketing by large numbers of men continued in violation of said injunction, and with the knowledge of and under the instructions of the defendant; that defendant unlawfully obstructed and interfered with complainant's right to freely engage in his normal business activities by wilfully and maliciously threatening various persons and corporations with which the complainant had contractual relations with picketing at their construction sites if they continued to do business with complainant; that defendant further unlawfully obstructed and interfered with complainant's right to freely engage in his normal business activities by inducing and encouraging, and attempting to induce and encourage, certain employers and the employees thereof, having contractual business relations with the complainant, to engage in a concerted refusal to continue such contractual business relations with complainant, and to force and require the complainant to recognize and bargain with the defendant, who was not certified as the representative of the employees of the complainant; that defendant further unlawfully obstructed and interfered with complainant's rights by willfully and maliciously inducing and encouraging the employees of other employers to engage in concerted refusals in the course of their employment to perform services, all for the purpose of forcing and requiring such employers to cease doing business with the complainant; that the mass picketing and secondary boycott

activities engaged in by the defendant against the complainant were in violation of the provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A. 145, and caused great damage to the complainant in that, among other things, (1) He lost numerous trucking jobs as a result thereof from which he would have received substantial profits but for said mass picketing and secondary boycott activities; (2) Numerous other jobs under contract by the complainant were delayed; and (3) Nearly all of complainant's trucking equipment was forced to remain idle during the aforesaid period of time.

Wherefore, complainant prays judgment against the defendant in the amount of \$50,000.00 as compensatory damages and \$50,000.00 as punitive damages.

In due course, defendant filed its answer, in which it generally denied the allegations of the second amended complaint.

It appears that the plaintiff had, for many years, been engaged in the trucking business in Tiffin, Ohio, and that he engaged, among other things, in general dump truck operations in which he used his own employees to operate a fleet of approximately fifty dump trucks which were used primarily in work on highway construction; that for some years prior to the year 1956 plaintiff's drivers were members of Local 625 of the Teamsters Union, and when that Union was merged into the defendant these employees became members of the defendant, and were such members throughout the period of the strike in question; that there was no contract between the defendant and the plaintiff prior to the strike in question.

It appears further that, in August of 1956, after plaintiff's drivers had met with representatives of the defendant, and had voted to strike in the event that the parties could not agree upon the terms of a contract, plaintiff met with representatives of the defendant on August 16, 1956,

at the offices of the defendant in Fremont, Ohio; that no contract was concluded at that meeting, and that, in the early morning of August 17, a large number of plaintiff's drivers and representatives of the defendant appeared at plaintiff's garage and office premises in Tiffin and initiated the strike against plaintiff, which continued until October 5, 1956; when a contract was signed by the parties; that said contract (Defendant's Exhibit D) was dated October 5, 1956, to expire March 1, 1959; that, at the time of the trial of this case in late April and early May of this year, there was no contract between the parties and apparently there is none at this date.

Plaintiff contends that the defendant engaged in unlawful strike activity during the strike when it encouraged the plaintiff's customers and suppliers, sometimes through their employees and sometimes directly, to stop doing business with the plaintiff; that, since the defendant engaged in unlawful activities against plaintiff, plaintiff is entitled to collect all damages he suffered as a result of defendant's total strike activity; that defendant violated both Federal statutory law and State common law, and that this Court, therefore, has jurisdiction to award damages.

Section 303 of the Labor Management Relations Act of 1947, 29 U. S. C. A., Sec. 187, during the period complained of, provided, in part, as follows:

"(a) It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . or to perform any services, where an object thereof is:

"(1) forcing or requiring any employer . . . to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person;

“(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . ;”

“(b) Whoever shall be injured in his business or property by reason of any violation of sub-section (a) of this section may sue therefor in any district court in the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.”

The unlawful secondary boycott by way of making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer, which plaintiff complains of, is predicated upon several Ohio cases, and particularly the case of *Moores & Co. v. Bricklayers' Union et al.*, 10 Ohio Decisions Reprint 48 (affirmed by the Supreme Court of Ohio, 51 O. S. 65), and the case of *Schmidt Packing Co. v. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America et al.*, 48 ALC 547 (1947), and particularly the case of *W. E. Anderson Sons Co. v. Local 311, Teamsters, etc.*, 156 O. S. 541; also upon 33 Oh. Jur. 2; *Labor, Sec. 64, Secondary Boycott*, pages 187-188.

The right of recovery for damages for the common law tort of conspiracy is based upon the case of *Perko v. Local 206, etc., et al.*, 168 O. S. 161 (1958).

Plaintiff relies upon the case of *Carpenters Union v. Cisco*, 266 Fed. (2d) 365 (cert. den. 361 U. S. 828), in his claim that he may recover damages measured by all of the revenue lost as the result of the entire strike activity of the defendant. In other words, he relies upon the “totality effort” rule.

In his claim of jurisdiction in this Court, as well as his right to rely upon the common law of the State, in addition to the Federal statute, plaintiff relies upon *United Mine Workers of America v. Meadow Creek Coal Co.*, 263 Fed. (2d) 52 (cert. den. 359 U. S. 1013), and *United Mine Workers of America v. Osborne Mining Co.*, 279 Fed. (2d) 716 (cert. den. 364 U. S. 881, 1960), and, in addition thereto, the common law of Ohio with respect to punitive damages as set forth in 16 *Oh. Jur. 2d, Damages* 281, Sec. 145 (*Tort Actions, Generally*), which reads, in part, as follows:

“It is an established principle of law in Ohio that in actions to recover damages for tort, which involve the ingredients of fraud, malice, or insult, or the wanton or reckless disregard of the legal rights of others, the jury may go beyond the rule of mere compensation of the party aggrieved, and award exemplary or punitive damages. * * *

Plaintiff concedes that, to the extent that it was peaceful and non-massive, the picketing that occurred at the plaintiff's garage at Tiffin was lawful. He concedes that, if the defendant had limited itself to that type of lawful activity, plaintiff would not be entitled to recover any damages from the defendant. Plaintiff contends, however, that the defendant engaged in substantial unlawful activity during the period of the defendant's strike against the plaintiff, and that it is impossible to distinguish between the damages plaintiff suffered as the result of defendant's lawful activity on the one hand and the defendant's unlawful activity on the other.

Plaintiff's premises were struck on the 17th day of August, 1956, and, on August 21, 1956, pursuant to motion filed by plaintiff in connection with the complaint filed in the Common Pleas Court of Seneca County, Ohio, that Court issued a restraining order “restraining the in-

dividual defendants and each and all of them, and all persons associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

"1. . . .

"2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representatives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, obstructing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

"3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent any of plaintiff's customers or any other members of the public from having business relations with the plaintiff.

"4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

"5. . . .

"6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business, or any part thereof.

"7. . . .

"8. . . .

(Plaintiff's Exhibit 2.)

We conclude, from the evidence, that, from and after the issuance of the aforesaid restraining order, defendant observed the requirements of paragraph 6 above, in that it thereafter confined its number of pickets at each entrance to the plaintiff's place of business to two. We further conclude from the record that, at no time during the strike

period, to wit, August 17, 1956, to October 5, 1956, both inclusive, was violent conduct engaged in.

The defendant contends that the primary strike and picketing at plaintiff's premises was not in violation of Section 303 of the Labor Management Relations Act of 1947; that it engaged in no illegal conduct with respect to the secondary or neutral employers; that inducements of individual employees do not violate Section 303 of the Act; that the picketing at France Stone Co. and Schoen Asphalt Paving Co. was primary and lawful, and that the evidence does not establish an inducement of the employees of these two concerns; that the pre-emption doctrine is an affirmative one, and that exclusive jurisdiction is vested in the National Labor Relations Board; that the pre-emption doctrine applies to conduct allegedly constituting a common law secondary boycott, and that in this case neither Federal nor State Courts have jurisdiction to award damages; that since no evidence of mob action is involved in this case the decisions heretofore cited, to wit, the *United Mine Workers of America v. Meadow Creek Coal Co.*, supra, and the *United Mine Workers v. Osborne Mining Co.*, supra, are inapplicable, that the defendant engaged in no conduct which violated the State Court restraining order, and that this Court should not, for various reasons, exercise authority to award punitive damages.

The defendant poses the following three questions as being the questions involved in this suit:

1. Whether the Union engaged in conduct which violates Section 303 of the Labor Management Relations Act of 1947:

2. Whether the Court has jurisdiction to entertain a claim for relief predicated upon an alleged common law secondary boycott:

3. Whether, in the circumstances of this case, punitive damages should be assessed against the Union.

The illegal acts complained of by plaintiff revolve around the France Stone Company, the Louis O'Connel Coal Company, the Launder & Son, Inc., and the C. A. Schoen, Inc. In addition thereto, the contracts involved those at the Wilson Sand & Gravel Co., and also the Seneca County contract.

During the trial of the case, which was tried to the Court, plaintiff's witness, William H. Heine, the Seneca County Engineer from Tiffin, Ohio, testified in connection with the contract that the County had with the Plaintiff for the hauling of stone for hardtop roads. He testified that Mr. Morton performed under the contract until August 17, 1956, and that, some time thereafter, Lawrence Evans, Business Agent of defendant, called at his office and asked him if he knew that a strike had been declared against Morton, and he replied that he did. However, on cross-examination, he stated that he had made the decision to discontinue with Morton several days before he was visited by Mr. Evans.

On the basis of this testimony, we concluded that the alleged unlawful activities of the defendant had nothing to do with the decision of the County Engineer to terminate the hauling contract with Morton, and that the damages claimed were too remote to be considered in any computation of damages. We sustained a defense motion to dismiss this claim and we, therefore, give it no further consideration.

In connection with the Wilson Sand & Gravel Co. contract, at the trial of the case we were concerned with the possible pertinency of the failure of plaintiff to perform under the contract to the conduct of the defendant of its strike, but we believe that, under the totality of effort rule, alleged damages in connection with this contract should be considered.

We believe that the acts of the defendant in connection with the France Stone Co., where Lawrence Evans, Business Agent of the defendant, took men who were striking against the plaintiff with picket signs to the premises of the France Stone Company and there set up a picket line was wrong. Plaintiff's Exhibit 13, a photograph taken by plaintiff on either the 23d or the 24th day of August, 1956, some two or three days after the issuance of the restraining order by the Common Pleas Court of Seneca County, establishes, beyond refutation, that the France Stone Company was picketed. The testimony of an employee of plaintiff, one John W. Combs (Record, p. 113), that, about a week after the strike commenced, he and his brother Joe were taken to the France Stone Co. by defendant's officer Evans corroborates the Exhibit 13. That these pickets were viewed by the employees of plaintiff, as well as the France Stone Co., is well established. The activities of defendant's agent Evans in contacting employees of the France Stone Co. is established.

We believe that the activity of defendant's agent at the France Stone Co. was unlawful under Section 303 and was an apparent effort to injure and coerce the plaintiff.

In connection with the O'Connell Coal Co., which had been a customer of plaintiff for a number of years, it was the plaintiff's duty under the contract to haul all of the O'Connell Company's requirements of sand and gravel into its Tiffin plant for use in its ready-mix concrete manufacturing operation.

Here, through the activities of one Kenneth Lidster, an employee of the Coal Co., and a steward of the defendant local; and through the activities of Irvin Mowery, Business Agent of the defendant, the O'Connell people were alerted to the strike. Contacts were made with this company by Mowery by telephone, as well as by personal visits.

We believe that Section 303 was violated in that the defendant encouraged the employees of the O'Connel Company to stop using plaintiff's trucks for the purpose of forcing or requiring the O'Connel Company to cease doing business with the plaintiff; that defendant's activity in connection with this company was unlawful under the common law of Ohio.

In connection with the Launder & Son, Inc., contract, plaintiff had a contract to transport the "batching" by truck to and at the site of a highway improvement that the Launder & Son Company was engaged in constructing. Here defendant's Business Agent Evans took strikers to the Launder job and, while there, talked to a boss on the Launder job, and asked him not to let any of plaintiff's trucks work there.

In connection with the C. A. Schoen, Inc., company, defendant's Business Agent Evans, together with some of the strikers, followed trucks of plaintiff to a stone quarry and then followed the trucks to Toledo to the premises of the Schoen company, where picketing was set up, where following conversation with defendant's Business Agent Sullenger, Schoen refused to permit the sand transported by plaintiff to be received. Other activities in connection with Schoen were along the same general lines. We believe that these activities were in violation not only of the Federal statute but the State common law.

In the course of the trial, Irvin Mowery was the first witness called by plaintiff. He testified that he was an organizer for Local 20, and that Sullenger, Evans and Reagan also worked out of the Toledo office; that, on the morning of the strike, he observed Evans there and that there were around thirty of Morton's employees and three pickets on duty; that he went to the O'Connel Company the next day after the start of the strike, where the O'Connel employees were members of the defendant local; that he

talked to their steward there and that, thereafter, he visited the O'Connel company once a week; that he talked with Howard Magers, Junior, President of the O'Connel company, three or four days before the strike and told him of the possibility of a strike, and at strike time he called Mr. Magers on the telephone and asked his co-operation.

John W. Combs testified that he worked for plaintiff in 1956, and that he belonged to the defendant local; that, on the first day, he stood picket at 8:00 A. M. and around 25 men were out there; that he appeared again the next day and that the same number of men were there, and that when the Court order issued 6 or 8 were there at any one time; that he went out to the France Stone Company with his brother under the direction of Mr. Evans and there set up a picket with signs; that Evans took him and his brother Joe to Fremont where the by-pass of Route 20 was being constructed by the Launder Company, and that Evans told the man at the gate not to let Morton's trucks in, and the man responded "I would like to go along with you"; that he and his brother and James Marcum, together with Evans, followed three of Morton's trucks as they came out empty at 9:00 A. M. to Maple Grove quarry five miles north of Tiffin where the trucks were loaded with No. 8 sand, and that they then followed the trucks into Toledo to the Schoen Asphalt Company where Evans talked with someone, and the trucks were not unloaded; that the drivers of the trucks left in a car, and that he and his brother got out with a picket sign along with James Marcum and placed themselves at the entrance. On cross-examination, he testified that after the Court order had issued the number of pickets at the entrances was reduced to 4.

Hubert Olds testified that he was a mechanic at the France Stone Company and a member of the operating engineers' Union; that a teamsters' Union man talked

with the Plant Superintendent, C. C. Robinson, and himself.

Witness Vernon Beam testified that he and Stokes and Cliff Smith took three trucks to the Dolomite quarry and loaded them with sand, and that they were followed by Evans, accompanied by Joe and John Combs; that they pulled into Schoen Asphalt just a few seconds after the trucks arrived; that Evans went into the office and that the Schoen Superintendent came out and "told us we couldn't unload"; that no trucks were unloaded and that "we left with Mr. Morton in his car"; that at the Schoen gates he saw two picket signs on each side of the entrance; that the Project Engineer at the by-pass on Route 20 "told us to take our trucks off the job after Larry Evans came out of the office."

Witness Charles Robinson testified that he drove into the France plant where he was employed as a Plant Manager, and saw the men at the entrance with picket signs, and that a fellow then came in in a black Cadillac.

Howard Stultz testified that he worked for plaintiff in 1956, but that he is not now working for plaintiff; that his position was that of a mechanic, and that he drove a truck for plaintiff in August of 1956; that he worked as a mechanic in the garage until the third or fourth day of the strike when he hauled sand to Schoen Asphalt in Toledo from the Dolomite quarry; that he saw men standing around a car talking, but saw no signs; that a man came out of the office and "told us to leave the truck unloaded"; that when he left the men were still at the gate; that he drove into the France Stone Company during the strike and saw a sign there at least two days indicating "Morton Company on strike"; that he saw the two Combs boys and Nye with the signs.

Elmer Luttrell testified that he was employed by Lauder & Sons in 1956 as Field Office and Batch Plant Man;

ager; that his employer was paving Route 20 by-pass; that they were using Morton's dump trucks and batch trucks, and that he was informed by Mr. Launder of the Morton strike; that after the strike three of Morton's trucks appeared for a short period of time; that Larry Evans "called me and asked if Morton's trucks were on the job".

Kenneth Lidster testified that he worked for the O'Connell Company in 1956, making ready-mix; that he drove a truck, and that the plaintiff "hailed our sand and I then belonged to Local 20"; that Irvin Mowery, one of defendant's Business Agents, called to see him, and that Mowery said they had a strike on Morton and he would just as leave "we didn't use his trucks"; that "I told our boss Howard Magers".

Howard Magers, Jr. testified that Kenneth Lidster "our Union Steward" informed me that Morton had been struck and he had been so informed by a teamster.

James Schoen testified that he was a paving contractor, Treasurer of Schoen Asphalt, and that Morton supplied sand in 1956; that, on August 20, he saw a sign at his entrance "Morton's strike", and that there were people around; that he talked to Ed Sullenger, Business Agent of defendant, and Sullenger "told us we could not and should not deal with Morton on strike; that the trucks should remain unloaded"; that he further had two conversations in his office with Sullenger, "when he tried to persuade us not to do business with Morton"; that he had other conversations over the telephone with Sullenger, all occurring within a week after the strike commenced, all "trying to persuade us not to use Morton's sand"; that a Mr. Evans also joined with Sullenger in the first conversation, but that he could not identify Evans.

Ransom Taulbee testified that he worked for plaintiff in 1956; that he did not work during the strike, the

reason was he did not want trouble, and that some trucks left plaintiff's during the strike, and that the trucks that left were followed by Evans and others; that he did not want to take a truck out and get followed or get hurt. On cross-examination, he testified that he saw Evans follow trucks more than once.

○ We have reviewed here some, but not all, of the activities engaged in by the defendant, through its Business Agents, in contacting suppliers and others that were doing business with the plaintiff in an apparent effort to discourage further business with plaintiff, and to injure the plaintiff in the operation of his business. Some of these activities, unfortunately, were engaged in after and in the face of the restraining order issued by the Common Pleas Court of Seneca County on the 21st day of August, 1956. Some of the contacts made by defendant's agents were made with employees of plaintiff's suppliers and companies with which the plaintiff was doing business, and some of the contacts were made with managers or superintendents or officers of these companies. All of them, apparently, had the same purpose in mind.

Looking at the picture as a whole, we conclude that the special damages suffered by plaintiff in connection with the Launder matter amounted to the sum of \$8,684.92; in connection with the O'Connel Company in the amount of \$1,644.79, and in connection with the Wilson Company in the amount of \$9,289.91, for a sum-total of \$19,619.62. Compensatory damages, therefore, in the sum of \$19,619.62 are awarded.

Coming to the question of punitive damages, we believe that some punitive damages should be awarded. The conduct of defendant, through its agents, constituting secondary activity was in violation not only of the Federal statute but of the common law of Ohio relative to secondary boycotts and conspiracy. Some of this activity, in viola-

tion of the restraining order of the Common Pleas Court of Seneca County, is regrettable.

Although the punitive damages awarded in the Meadow Creek and the Osborne cases, *supra*, were predicated substantially upon the extreme violence that pervaded the strikes, we see no reason why the award of punitive damages should be limited to cases where violence is engaged in. Here the objective was to bring the plaintiff to his knees, and the means employed were unlawful. An award of \$15,000.00 as and for punitive damages is assessed.

In the course of our consideration of this case, we have not only studied and considered the cases of the United Mine Workers and the Osborne Company, *supra*, but also, in particular, the following cases: *Local Union No. 984, etc., et al. v. Humko Company, Inc. etc. et al.*, 287 Fed. (2d) 231 (Cert. Den. 1961); *Carpenters Union, Local 131 et al. v. Cisco Construction Co., etc.*, 266 Fed. (2d) 365 (Cert. Den. 361 U. S. 828), and the case of *United Brick & Clay Workers of America et al. v. Deena Artware, Inc.* (6th Cir.), 198 Fed. (2d) 637, which is cited in the Cisco case, *supra*; also the case of *William Gilchrist, Jr. et al. v. United Mine Workers of America*, 290 Fed. (2d) 36 (Cert. Pending 12/14/61).

Plaintiff may, within fifteen (15) days, prepare and lodge with the Court Findings of Fact and Conclusions of Law drawn in accordance with this Opinion. Defendant may, within fifteen (15) days thereafter, note its exceptions or suggested additions thereto.

An order may be drawn accordingly.

(signed) Frank L. Kloebe,
United States District Judge.

Toledo, Ohio.

APPENDIX B.

No. 14984.

**United States Court of Appeals
For the Sixth Circuit.**

**Lester Morton, d/b/a Lester Mor-
ton Trucking Company,
Plaintiff-Appellee,**

v.

**Local 20, Teamsters, Chauffeurs,
and Helpers Union, an Affiliate
of the International Brotherhood
of Teamsters, Chauffeurs, Ware-
housemen and Helpers of
America,**

Defendant-Appellant.

**On Appeal from the
United States Dis-
trict Court for the
Northern District
of Ohio, Western
Division.**

Decided July 25, 1963.

**Before: O'Sullivan, Circuit Judge, Boyd and Thornton,
District Judges.**

**Thornton, District Judge. Plaintiff filed this action in
the district court seeking damages on account of a sec-
ondary boycott against it. The primary strike commenced
August 17, 1956 and continued until October 5, 1956.
Plaintiff claims that defendant's activities were unlawful
within the purview of § 303 of the Labor Management
Relations Act of 1947, 29 U. S. C. A., § 187, as well as
being unlawful under the common law of the State of Ohio.**

District Judge Kloeb, by his findings of fact and conclusions of law filed separately from his opinion, found that defendant had engaged in unlawful secondary activity that was violative of § 303 and also of the common law of Ohio. He awarded \$19,619.62 compensatory damages plus \$15,000.00 punitive damages.

The questions raised by appellant-defendant on this appeal have been resolved on one or more prior occasions by the Supreme Court of the United States or by this court. Defendant seeks to distinguish this case from those that have preceded it in the various particulars upon which it bases its argument for reversal.

I. Jurisdiction Where Federal Claim Joined With Non-Federal Common Law Tort Action.

Defendant contends that a federal court is without jurisdiction to entertain a suit for damages based on a secondary boycott unlawful under state law even though the suit also seeks damages under § 303 for an unlawful secondary boycott. This contention is directly contrary to the holding in the 1933 decision of *Hurn v. Ousler*, 289 U. S. 238, as well as that in a number of recent cases decided by this court. Included among these are *Flame Coal Company v. United Mine Workers of America*, 303 F. (2) 39 (6 Cir., 1962); *White Oak Coal Company v. United Mine Workers of America*, decided May 24, 1963, ... F. (2) ... (6 Cir.); *United Mine Workers of America v. Meadow Creek Coal Company*, 263 F. (2) 52 (6 Cir., 1959), certiorari denied, 359 U. S. 1013; and *United Mine Workers of America v. Osborne Mining Co.*, 279 F. (2) 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887. Defendant contends that since there was no violence in the instant case a different rule applies. We are not aware of such a distinction and in fact are unable to appreciate any legal or logical reason for such a jurisdictional distinction. No

decided case has been called to our attention in support of this contention by defendant. Another aspect of this argument advanced by defendant is that if the state court could not have entertained this suit for damages under state common law because of pre-emption by federal law there can be no recovery here. This contention is disposed of adversely to defendant by the holdings in the five cases above cited. The holdings in these cases permit joining federal and nonfederal grounds in support of a cause of action. A nonfederal cause of action is not extinguished because a state court is pre-empted by federal law from providing relief. We do not here decide that a state court is pre-empted from entertaining such a suit and awarding damages. We make the observation that the Supreme Court on December 10, 1962 handed down a decision holding that a § 301 action was not subject to the pre-emption doctrine under Garmon.¹ *Smith v. Evening News*, 371 U. S. 195. It may be that the same considerations apply to a § 303 cause of action. See *Local 100 of the United Association of Journeymen and Apprentices v. Borden*, decided June 3, 1963, ... U. S. ..., footnote 3 of which reads as follows:

“49 Stat. 452, as amended, 28 U. S. C., §§ 157, 158.
○ We do not deal here with suits brought in state courts under §§ 301 or 303 of the Labor Management Relations Act, 61 Stat. 156, 158, 29 U. S. C., §§ 185, 187, which are governed by federal law and to which different principles are applicable. See, e. g., *Smith v. Evening News Assn.*, 371 U. S. 195.”

Is it not implicit in the above that state courts are not subject to the pre-emption doctrine insofar as both § 301 and § 303 are concerned?

¹ *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

II. Denial of Motion to Amend Answer.

Prior to the trial date in the district court defendant asked for leave to file a motion to dismiss the amended complaint. Such leave was granted. The basis for the motion was set forth in defendant's memorandum in support thereof, namely, that a state court order dismissing plaintiff's action for the common law secondary boycott damages was res judicata and that such subject matter therefore could not be included in the instant suit in federal district court. The order of the state court reads as follows:

"It is Ordered that this matter be, and the same hereby is, dismissed otherwise than upon the merits, without the consent of the plaintiff, *without prejudice to a new action based upon the same subject matter*,* and for the reason that the Court does not have jurisdiction of the subject matter under the decision of the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 49 A. L. C. 485. Exceptions saved to the plaintiff and defendant's costs taxed to the plaintiff."

It is clear that the reason for its issuance was the doctrine of pre-emption. The state court's citation of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), was obviously for the purpose of indicating the authority upon which it relied in holding that state court jurisdiction was absent, not for the purpose of determining that jurisdiction was present in some other forum, a determination that may be made initially only by each forum for itself. It happens that the court in *San Diego* was concerned with the primary jurisdiction of the National Labor Relations Board to adjudicate the status of a disputed activity. The court there said that "(W)hen an activity is arguably

* Emphasis supplied.

subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. It also said: "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate." *San Diego v. Garmon*, supra, 245-246. The Board has no power therefore to award compensation. Neither has the state court such power in an area of federal pre-emption. However, Congress has provided a forum by virtue of 29 U. S. C. A., § 187, and this is completely independent of any National Labor Relations Board proceeding.² *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U. S. 237 (1952). The trial court denied this motion to dismiss. When the trial of this case began defendant again sought to present its res judicata contention by moving to amend its answer to add res judicata as an affirmative defense. This motion was denied by the trial court and such denial is here raised by defendant as constituting prejudicial error. We cannot agree. The granting or refusal of leave to amend is within the trial court's sound discretion. *Chesapeake & Ohio Railway Company v. Newman*, 243 F. (2) 804, 813 (6 Cir., 1957). We do not here find an abuse of such discretion. In view of the nature of this amendment and in the light of what we have said above in regard to the law applicable to the res judicata contention of defendant, such defense is without merit. Its exclusion did not constitute prejudicial error.

III. Proof of Secondary Boycott.

The findings of fact of the district judge as to secondary boycott activities violative of § 303 and of the state com-

² One of the contentions advanced by appellant here is that the Board had exclusive jurisdiction of the subject matter of this controversy.

mon law are amply supported by the evidence and are not clearly erroneous. *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 291. It would serve no useful purpose to here review the particular activities.

IV. Damages.

That compensatory and punitive damages are recoverable for unlawful secondary boycott activities cannot be disputed. *Gilchrist v. United Mine Workers of America*, 290 F. (2) 36 (6 Cir., 1961), certiorari denied, 368 U. S. 75; *Flame Coal Company v. United Mine Workers of America*, 303 F. (2) 39 (6 Cir., 1962). That such damages are not capable of precise ascertainment does not preclude their allowance. *United Mine Workers of America v. Osborne Mining Co.*, 279 F. (2) 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931). The basis upon which the lower court awarded compensatory damages in the amount of \$19,619.62 was a reasonable and justifiable one. There was evidence to support the award and the trial court's findings are not clearly erroneous. *Commissioner v. Duberstein*, supra. As to the punitive damage award of \$15,000.00, we cannot say that there was an abuse of discretion. The fact that the activities here engaged in did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable.

For the foregoing reasons the judgment below is affirmed.

APPENDIX C.

Cause Argued and Submitted

February 9, 1963.

Before: O'Sullivan, Circuit Judge,

Boyd and Thornton, District Judges.

This cause is argued by David Leo Uelmen for defendant-appellant and by M. J. Stauffer for plaintiff-appellee, and is submitted to the Court.

Judgment.

(Filed July 25, 1963.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ Thomas P. Thornton,
United States District Judge,
(Sitting by Designation).

APPENDIX D.

Section 303 of the Labor Management Relations Act of 1947 provided:

“(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

APPENDIX E.*									
SIXTH CIRCUIT					OTHER CIRCUITS				
Case	Actual	Punitive	Case		Actual	Punitive	Case	Actual	Punitive
1**	\$ 300,000	\$100,000	13		\$ 760,000	\$ 0	16	\$ 353,193	\$ 0
2	185,000	50,000	14		201,274	?	17	100,000	0
3	84,136	0	15		75,000	0			
4	360,000	119,000							
5	8,225	50,000							
6	5,500	0							
7	15,690	10,000							
8	264,000	0							
9	19,613	15,000							
10	185,000	125,000							
11	?	?							
12	30,000	45,000							
Sub-total	\$1,437,170	\$514,000	Sub-total		\$1,036,274	\$ 0	Sub-total	\$ 463,193	\$ 0
TOTALS									
	Actual	Punitive			Actual	Punitive			
Sixth Circuit	\$1,437,170	\$514,000			\$1,437,170	\$514,000			
Other Circuits	1,036,274	0***			1,036,274	0***			
State Courts	463,193	0			463,193	0			
	\$2,936,637.	\$514,000			\$2,936,637.	\$514,000			

* We have attempted to tabulate all reported cases in which an award of damages has been made under Section 303 of the Act as of September 1, 1963.

** Case 1 times and citations appear on the next page of this Appendix E.

*** See footnote 14, *infra*, p. 41.

1. *United Mine Workers v. Meadow Creek Coal Co.*, 263 F. 2d 52 (C. A. 6), *cert. denied* 359 U. S. 1013. Violence proved.
2. *United Mine Workers v. Osborne Mining Co.*, 279 F. 2d 16 (C. A. 6), *cert. denied* 364 U. S. 381. Violence proved.
3. *Teamsters Local 984 v. Humko Co.*, 287 F. 2d 232 (C. A. 6), *cert. denied* 366 U. S. 962. No violence.
4. *Gilchrist v. United Mine Workers*, 290 F. 2d 36 (C. A. 6), *cert. denied* 368 U. S. 875. Violence proved.
5. *Flame Coal Co. v. United Mine Workers*, 303 F. 2d 39 (C. A. 6), *cert. denied* 371 U. S. 891. Violence proved.
6. *Wells v. Operating Engineers*, 303 F. 2d 73 (C. A. 6), *affirming* 206 F. Supp. 414 (W. D. Ky.), wherein the amount of the judgment is reported. No violence.
7. *Blair v. United Mine Workers*, 211 F. Supp. 786 (E. D. Ky.)—punitive damages awarded although not prayed for by plaintiff. Violence proved.
8. *Sunfire Coal Company v. United Mine Workers*, 313 F. 2d 108 (C. A. 6). The court's opinion does not expressly indicate whether any part of the judgment consisted of punitive damages. The opinion of the district court is not reported. Violence proved.
9. *Morton v. Teamsters Local 20*, 200 F. Supp. 653 (N. D. Ohio), *aff'd* ... F. 2d ... (C. A. 6); reprinted in Appendix B, *supra*, p. 31. No violence.
10. *White Oak Coal Co., Inc. v. United Mine Workers*, 53 LRRM 2351 (C. A. 6). Violence proved.
11. *Allen v. United Mine Workers*, 53 LRRM 2648 (C. A. 6). The court affirmed an award of both actual and punitive damages in an unspecified amount. Violence proved.
12. *Gibbs v. Mine Workers*, 54 LRRM 2080 (E. D. Tenn.). Violence proved.
13. *Longshoremen's Union v. Juneau Spruce*, 189 F. 2d 177 (C. A. 9), *aff'd* 342 U. S. 237. No violence.
14. *Longshoremen's Union v. Hawaiian Pineapple Co.*, 226 F. 2d 875 (C. A. 9), *cert. denied* 351 U. S. 963. As more clearly appears from the district court opinion an unspecified portion of the judgment consisted of punitive damages. See: 107 F. Supp. 805 (D. Ore.). This case involved violence.
15. *Carpenters Union v. Cisco Construction Co.*, 266 F. 2d 365 (C. A. 9), *cert. denied* 361 U. S. 828. No violence.
16. *Overnight Transportation Co. v. Teamsters*, 257 N. G. 18, 125 S. E. 2d 277, *cert. denied* 371 U. S. 862. No violence.
17. *Dairy Distributors v. Teamsters Local 976*, 8 Utah 2d 124, 329 P. 2d 414, *cert. denied* 360 U. S. 909. Connected case reporting amount of verdict at 394 F. 2d 348 (C. A. 10). No violence.

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In the Supreme Court of the United States

No. 485.

OCTOBER TERM, 1963.

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION, an Affiliate of the International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of
America,

Petitioner,

VS.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

M. J. STAUFFER,
165 East Washington Row,
Sandusky, Ohio,
Counsel for Respondent.

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In the Supreme Court of the United States

No. 485.

OCTOBER TERM, 1963.

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION, an Affiliate of the International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of
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Petitioner,

vs.

**LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY,**

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

BRIEF FOR RESPONDENT IN OPPOSITION.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court, printed in Appendix A to the Petition for Certiorari, is reported in 200 F. Supp. 653. The opinion of the Court of Appeals, printed in Appendix B to the Petition for Certiorari, is reported at 53 L. R. R. M. 2839.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix C to the Petition for Certiorari (page 37), was entered on July 25, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether a federal court having jurisdiction of a labor union that has violated Section 303, Labor Management Relations Act of 1947, has jurisdiction also to award compensatory and punitive damages against such union where it has engaged in activities constituting intimidation and threats to the public order and constituting, under state common law, a secondary boycott and the tort of malicious and wanton interference with business, where such state common law allows such compensatory and punitive damages.

2. Whether Respondent's total damages were properly awarded him when such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

STATUTE INVOLVED.

The statute involved in Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, 29 U. S. C., Section 187. It is printed in Appendix D to the Petition for Certiorari (page 38-39).

STATEMENT.**The Facts.**

The Respondent, Lester Morton, d/b/a Morton Trucking Company (referred to as "Respondent") is engaged in the general dump truck business in Tiffin, Ohio, operating approximately 50 dump trucks as a subcontractor on highway construction (Finding of Fact 1).¹ For some years the Respondent's employees had been members of the petitioning Teamsters Local 20 (referred to as "Teamsters Union") under an oral agreement, but on August 17, 1956 the Teamsters Union struck in support of its demands for a written contract and wage increases (F. F. 2). On August 21, 1956 the Common Pleas Court of Seneca County, Ohio restrained the Teamsters Union from, inter alia, engaging in secondary boycott activity, from intimidating Respondent's employees and from following Respondent's employees on the public highways or elsewhere (F. F. 3).

The Teamsters Union's Malicious Intimidation.

The Teamsters Union did not engage in any actual physical violence during the strike, which ended October 5, 1956 (F. F. 2 and 4) but the Teamsters Union caused some of Respondent's employees who did go to work and drive his trucks to be followed along rural roads and highways by automobiles containing the Teamsters Union's agents and striking members (76-79a, 107a, 108a). This intimidating and threatening activity of the Teamsters Union made the strike effective to prevent many of Respondent's employees from returning to work (314a, 315a; F. F. 10).

¹ The District Court's Findings of Fact and Conclusions of Law are Appendix A to this brief.

The Teamsters Union also maliciously engaged in secondary activity unlawful under Section 303, L. M. R. A., and the common law of Ohio (F. F. 13; Conclusion of Law 5). This unlawful activity made the strike effective to intimidate Respondent's employees, customers and suppliers, severely damaging Respondent's business as hereinafter set forth.

A. SECTION 303 VIOLATIONS.

1. France Stone Company.

One of Respondent's suppliers was The France Stone Company. In violation of the restraining order and in violation of Section 303 of the Labor Management Relations Act and the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged France's employees to engage in a concerted refusal to load Respondent's trucks for the purpose of forcing France to cease doing business with the Respondent (66a, 67a, 70a, 71a, 96a, 97a, 123a; F. F. 6 and 13; C. L. 5).

2. O'Connel Coal Co.

One of Respondent's customers was the O'Connel Coal Co. In violation of Section 303, L. M. R. A., and the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged O'Connel's employees to force O'Connel, and encouraged the management of O'Connel direct, to cease doing business with the Respondent (151a, 152a, 153a, 157a, 158a, 162a; F. F. 7 and 13; C. L. 5). Consequently, O'Connel ceased doing business with the Respondent during the strike (162a; F. F. 7 (d)) and Respondent suffered \$1,600.00 in damages (471a, 475a; F. F. 12).

3. C. A. Schoen, Inc.

Another of Respondent's customers was C. A. Schoen, Inc. In violation of the restraining order and in violation of Section 303, L. M. R. A., and the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged Schoen's employees to force Schoen, and encouraged the management of Schoen direct, to cease doing business with the Respondent (170a, 77-81a, 106-111a, 175-184a; F. F. 9 and 13; C. L. 5). Consequently, Schoen ceased doing business with the Respondent during the strike (174-177a, 175-184a; F. F. 9 (d)).

B. COMMON LAW VIOLATIONS.

1. Launder & Son, Inc.

Another of Respondent's customers was Launder & Son, Inc. In violation of the restraining order and in violation of the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged and requested Launder to cease doing business with the Respondent (196a, 111-115a, 73-76a; F. F. 8 and 13; C. L. 5). Consequently, Launder ceased doing business with the Respondent during the strike (201a; F. F. 8 (c)) and Respondent suffered \$8,700.00 in damages (474a, 475a; F. F. 12).

2. Wilson Sand & Gravel Co.

Another of Respondent's customers was the Wilson Sand & Gravel Co. As a result of a combination of the Teamsters Union's primary picket line and its unlawful secondary activity, Respondent had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson and consequently, Respondent suffered damages in the amount of \$9,300.00 (227a, 253a, 473a, 475a; F. F. 11 and 12).

The Proceedings Below.

The district court concluded that the Teamsters Union had engaged in secondary boycott activity unlawful under Section 303, L. M. R. A., and that such court had jurisdiction to adjudicate the Respondent's entire cause of action. That court also concluded that the material and operative facts supporting Respondent's federal claim of secondary activity unlawful under Section 303, L. M. R. A., were substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity and that there are not involved two causes of action, but simply different grounds to support the same cause of action, the cause of action being the Teamsters Union's violation of Respondent's right to be free from unlawful interference with his business (C. L. 1, 2 and 3). The district court also concluded that under *Hurn vs. Oursler*, 289 U. S. 238, and *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6), certiorari denied 359 U. S. 1013, it had jurisdiction to award compensatory and punitive damage under the common law in addition to having jurisdiction to award compensatory damages under Section 303, L. M. R. A. (C. L. 4). The district court also found that the Teamsters Union had engaged in both lawful and unlawful strike activity and concluded that therefore the totality of the Teamsters Union's efforts should be considered in assessing damages based upon all loss suffered as a result of the strike (C. L. 6).

The district court found that the Respondent suffered net specific damages in the amount of \$19,619.62 (471a, 473a, 474a, 475a; F. F. 12) and awarded compensatory damages in that amount together with punitive damages in the amount of \$15,000.00 as a consequence of the fact that

the Teamsters Union's conduct was pursued maliciously and in wanton disregard of the legal rights of the Respondent (F. F. 13 and 14).

The Court of Appeals for the Sixth Circuit affirmed the judgment of the district court and the Teamsters Union has petitioned for certiorari.

SUMMARY OF ARGUMENT.

QUESTION I.

1. The federal district court in this action had jurisdiction over the Teamsters Union as a consequence of its violation of Section 303, L. M. R. A., and therefore such court had ancillary jurisdiction to apply the state common law to award compensatory and punitive damages for violations thereof.

2. The doctrine of ancillary jurisdiction is one of general application and is not dependent upon the presence of intimidation and threats to the public order.

3. There were, however, intimidation and threats to the public order in this case and such Teamsters Union's conduct was further justification for awarding compensatory and punitive damages under state law.

QUESTION II.

The federal district court correctly awarded Respondent his total damages because such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union, (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

ARGUMENT.**QUESTION I.**

A federal court having jurisdiction of a labor union that has violated Section 303, Labor Management Relations Act of 1947, has jurisdiction also to award compensatory and punitive damages against such union where it has engaged in activities constituting intimidation and threats to the public order and constituting, under state common law, a secondary boycott and the tort of malicious and wanton interference with business, where such state common law allows such compensatory and punitive damages.

1. The Federal Courts' Ancillary Jurisdiction.

The district court concluded that the Teamsters Union's conduct in appealing to the employees of Respondent's suppliers and customers for the purpose of encouraging such employees to force such suppliers to cease doing business with the Respondent violated Section 303 of the Labor Management Relations Act and that compensatory damages should be granted thereunder for such conduct (627-8a). The district court also concluded that the petitioning Teamsters Union's conduct in appealing *direct* to Respondent's suppliers and customers for the purpose of encouraging or forcing them to cease doing business with the Respondent violated the common law of Ohio; that such conduct by the petitioning Teamsters Union was conducted maliciously and in wanton disregard of the rights of the Respondent; and that compensatory and punitive damages should be granted under the common law of Ohio (F. F. 13; C. L. 5) (626-7a).

The Ohio common law is important in this case because at the time of the strike here involved Section 303 of

the Labor Management Relations Act did not proscribe a union's applying pressure directly on a customer or supplier when employees were not contacted.²

The common law of Ohio clearly establishes that appeals by a striking union to the struck employer's customers and suppliers, urging cessation of business by those customers and suppliers with the struck employer are unlawful and this is so whether or not the striking union appeals to such customers' or suppliers' employees, and damages may be awarded the struck employer for the losses suffered. 33 *Ohio Jurisprudence* (2) Section 64, Secondary Boycott, pages 187-8; *Moores & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547 (1947); and *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541. The common law of Ohio also is to the effect that punitive damages may be awarded in tort actions which involve malice or the wanton disregard of the legal rights of others; 16 *Ohio Jurisprudence* (2) Damages, Section 145, Tort Actions Generally, page 281; *Smithhisler vs. Dutter*, 157 O. S. 454, 105 N. E. (2) 868 (1952).

The Sixth Circuit Court of Appeals held that the Findings of Facts of the district court as to secondary boycott activities violative of Section 303 of the Labor Management Relations Act and of the state common law were "amply supported by the evidence and are not clearly erroneous", citing *Commissioner of Internal Revenue vs. Duberstein*, 363 U. S. 278, 291. The district court con-

² Section 303 has since been amended and now proscribes such activity. Since the federal statute and state common law are now in accord, this case is of very limited significance.

cluded that the Respondent's claim of unlawful secondary activity violative of Section 303 of the Labor Management Relations Act and unlawful activity violative of the common law of Ohio are not separate causes of action, but merely different grounds to support a single cause of action, the cause of action being the violation by the Teamsters Union of the Respondent's right to be free from unlawful interference with his business. The Sixth Circuit Court of Appeals agreed, citing, inter alia, *Hurn vs. Oursler*, 289 U. S. 238; *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959), cert. den. 359 U. S. 1013; and *United Mine Workers vs. Osborne*, 279 F. (2) 716 (C. A. 6, 1960), cert. den. 364 U. S. 881.

The petition for certiorari herein fails to discuss the applicability of *Hurn vs. Oursler*, *supra*, although it is the *Hurn* case which the Court of Appeals below relied upon in affirming the jurisdiction of the district court to retain jurisdiction of this case to award compensatory and punitive damages under the state common law. It is also the *Hurn* case that the Sixth Circuit Court of Appeals relied upon in affirming the jurisdiction of the federal district courts to award compensatory and punitive damages under state common law in the *Meadow Creek* and *Osborne* cases, *supra*. In the *Hurn* case this Court held that when a case presents a substantial federal question, the trial court has jurisdiction to dispose of all grounds, either federal or state, which are "in support of a single cause of action". There, a suit was filed in the United States District Court seeking redress for copyright infringement which raised a substantial federal question and sought to obtain relief, as well, upon the ground that identical acts constituting the alleged infringement were also unfair competition under the state law. It was held by this Court that the federal question raised by the pleadings gave the court

jurisdiction; and that, although the federal claim was rejected on the merits, the district court still possessed jurisdiction to decide the claim of unfair competition on the merits.²

The petition for certiorari herein likewise does not discuss the applicability of the *Meadow Creek* and *Osborne* cases, *supra*, although in its Court of Appeals brief the Teamsters Union unsuccessfully attempted to distinguish them on the grounds that they involved actual and extensive violence. There is nothing in the Court of Appeals' opinions to suggest that jurisdiction was dependent upon the presence of violence, actual or threatened. In the *Meadow Creek* case, which was on this point followed in the *Osborne* case, the Court of Appeals (263 F. (2) 52, 60, 64) relied upon the *Hurn* case as authority for the jurisdiction of the trial court to award compensatory and punitive damages under the state common law. In the *Meadow Creek* case the Court of Appeals (263 F. (2) at 64) awarded punitive damages because of the *maliciousness* of the civil conspiracy, not because of the violence involved. And it surely is not necessary to observe that the *Hurn* case did not involve actual or threatened violence.

As pointed out at page 29 et seq. of the Respondent's brief in opposition to the petition for certiorari in the *Gilchrist* case, the doctrine of ancillary or pendent jurisdiction is a rule of general application which has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn vs. Oursler*,

² The case now before the Court is stronger for the Respondent than the *Hurn* case because here the federal claim was not rejected on the merits. The Teamsters Union has been found to have violated Section 303, L. M. R. A.

supra; *Armstrong Paint and Varnish Works vs. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *In re Amtorg Trading Corp.*, 75 F. (2) 826 (Ct. of Patent App., 1935); *Edelmann & Co. vs. AAA Specialty Company*, 88 F. (2) 852 (C. A. 7, 1937); *Sinko vs. Snow-Craggs Corporation*, 105 F. (2) 450 (C. A. 7, 1939); *Maternally Yours vs. Your Maternity Shop*, 234 F. (2) 538 (C. A. 2, 1956).

(2) Under the Jones Act wherein claims are combined for unseaworthiness and maintenance and cure with an admiralty claim in such cases as *Jordine vs. Walling*, 185 F. (2) 662 (C. A. 3, 1950); *Troupe vs. Transit Company*, 234 F. (2) 253 (C. A. 2, 1956); *Doucette vs. Vincent*, 194 F. (2) 834 (C. A. 1, 1952).

(3) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company vs. Van Hoosear*, 72 F. (2) 903 (C. A. 9, 1934); *Strachman vs. Palmer*, 177 F. (2) 427 (C. A. 1, 1949); *Chicago Great Western Railway Co. vs. Chicago, Burlington and Quincy Railway Co.*, 193 F. (2) 975 (C. A. 8, 1952).

(4) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion vs. Connell*, 236 F. (2) 447 (C. A. 9, 1956); *Jung vs. K & D Mining Co.*, 260 F. (2) 607 (C. A. 7, 1958).

(5) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *South Side Theatres vs. United West Coast Theatres Corporation*, 178 F. (2) 648 (C. A. 9, 1949); *Braddick v. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(6) In cases wherein claims under the Fair Labor Standards Act are combined with claims for compensation outside of said acts in such cases as *Manosky v. Bethlehem Hingham Shipyard*, 177 F. (2) 526 (C. A. 1, 1949); *Hogue vs. National Automotive Parts Association*, 87 F. Supp. 816 (E. D. Mich., 1949); *Wertanen et al. vs. Welduction Corporation*, 151 F. Supp. 440 (E. D. Mich., 1957).

(7) In cases wherein claims under statutes relating to national banks are combined with claims under the state or common law in such cases as *Gulley vs. First National Bank of Meridian*, 81 F. (2) 502 (C. A. 5, 1936).

(8) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company vs. Owensboro Milling Company*, 222 F. (2) 109 (C. A. 6, 1955).

(9) In cases wherein a claim against a labor union under Section 303, L. M. R. A., is combined with a claim for compensatory and punitive damages under state common law in such cases as *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959) cert. den. 359 U. S. 1013; *William G. Gilchrist, Jr., et al. vs. United Mine Workers*, 290 F. (2) 36 (C. A. 6, 1961) cert. den. 368 U. S. 875; *United Mine Workers vs. Osborne Mining Co., Inc.* 279 F. (2) 716 (C. A. 6, 1960) cert. den. 364 U. S. 881; and *Flame Coal Company vs. United Mine Workers*, 303 F. (2) 39 (C. A. 6, 1962), cert. den. 371 U. S. 891.

It is submitted that the foregoing cases establish that the applicability of the doctrine of pendent or ancillary jurisdiction is not dependent upon the presence of violence, actual or threatened. Accordingly, the district court

had ancillary jurisdiction to hear and determine Respondent's common law cause of action, without regard to the existence of violence, actual or threatened.

2. The Garmon, Laburnum, Russell and Youngdahl Cases.

Because the Teamsters Union must distinguish the recent *Meadow Creek*, *Osborne*, *Gilchrist* and *Flame* cases, *supra*, if it is to have any hope of having certiorari granted in this case, the Teamsters Union observes that there was no actual violence in this case. In the last mentioned cases there was, of course, extensive actual violence, although as stated above, the Court of Appeals did not suggest that its jurisdiction depended in any way upon the presence of such actual violence.

An examination of the petitions for certiorari and the briefs in opposition thereto in the *Meadow Creek*, *Osborne* and *Gilchrist* cases establishes that the trial courts' jurisdiction to grant compensatory and punitive damages for common law violations was extensively argued before this Court. None of such briefs even suggested that the actual violence there involved in any way supported the trial courts' jurisdiction.

The Teamsters Union's argument as to the absence of actual violence in this case requires consideration of *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236 (1959); *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Russell*, 356 U. S. 635 (1958); *United Construction Workers, etc. vs. Laburnum Construction Corp.*, 347 U. S. 656 (1954); and *Youngdahl, etc. vs. Rainfair, Inc.*, 355 U. S. 131 (1957).⁴

⁴ It must be remembered however that Section 303, L. M. R. A. was not involved in *Garmon*, *Russell*, *Laburnum* and *Youngdahl*.

The *Garmon* case of course held that the California state court could *not* grant a monetary judgment against a union for violation of the state's *statutory* law, where the union's conduct was peaceful and involved no imminent threats to the public peace and order. In *Garmon* (359 U. S. at 247) the Court said:

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell*, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; *United Construction Workers, etc. v. Laburnum Const. Corp.*, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; *United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Wisconsin Employment Relations Board*, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."

If, as the Teamsters Union contends, *Garmon* (together with the *Laburnum*, *Russell* and *Youngdahl* cases discussed therein) is authority to be applied here, that authority must be applied properly and not as the Teamsters Union suggests. The *Garmon*, *Laburnum*, *Russell* and *Youngdahl* cases hold that state courts applying state law cannot enjoin or award damages against unions for conduct arguably constituting an unfair labor practice under the Labor Management Relations Act unless there is either violence or an imminent threat to the public order. The *Garmon* case involved neither violence nor an im-

minent threat to the public order. The *Laburnum*, *Russell* and *Youngdahl* cases, like the instant case, involved no actual physical violence but did involve imminent threats to the public order. The nature of the conduct involved in *Laburnum* and *Russell* is reviewed in footnote 4 of each decision where it appears that although there were threats there was no actual physical violence.

In *Laburnum*, which affirmed a state court award of compensatory and punitive damages against a union which by threats but not by physical violence, demanded that plaintiff's employees join the union, with the result that the employer had to abandon its work, this Court held, 347 U. S. at 664, that Congress has neither provided or suggested any substitute for the traditional state court procedure for collecting damages caused by tortious conduct involving threats to the public order even though such conduct constituted an unfair labor practice under the Labor Management Relations Act. In *Russell*, which affirmed a state court award of compensatory and punitive damages against a union arising out of conduct violative of the Labor Management Relations Act where by intimidation but not by actual physical violence, the union denied a worker access to a plant during a strike, this Court held, 356 U. S. 641-2, that the fact that the Labor Management Relations Act provided a means of "partial" relief by way of a monetary award of back pay, did not preclude a victim of a common law tort involving intimidation and threats to the public order from a common law action for all damages suffered. Likewise, in this case, the fact that the Labor Management Relations Act provided a measure of partial relief by way of a suit for damages for certain types of secondary activity will not preclude a victim of the common law tort of secondary boycott activity involving intimidation and threats to the public order, from a common law action for all damages suffered.

In *Youngdahl* this Court approved the issuance of a state court injunction to the extent that it enjoined a striking union that had *not* engaged in actual violence against conduct consisting of verbal insults and name calling that was *calculated to provoke* violence. In that case the union relied heavily on the argument that there had been no actual violence but this Court held (355 U. S. at 138) that the issue was whether "the conduct and language of the strikers were likely to cause physical violence" (emphasis added); that words can readily be so coupled with conduct to provoke violence; and that the trial court "was in a better position (than this Court) to assess the local situation (and to conclude that) the conduct and massed name calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained."

3. The Teamsters Union's Intimidation and Threats to the Public Order.

Although the instant case did not involve actual physical violence, it certainly involved "imminent threats to the public order." The Teamsters Union did not content itself with peacefully picketing the Respondent's garage and terminal. When it became apparent that such conduct was not effective to prevent Respondent's employees from going to work, the Teamsters Union caused some of the employees that did go to work to be followed in automobiles filled with strikers or agents of the Teamsters Union, or both (76-79a, 107a, 108a, 128a, 129a, 314a, 315a; F. F. 10). The trailing of lone truck drivers, down country roads by car loads of Teamsters Union agents and strikers was well calculated to intimidate and threaten such truck drivers. This course of action by the Teamsters Union was effective to cause an employee who did not want to risk getting hurt from crossing the picket line (F. F. 10). The

Respondent's employees were further intimidated by repeatedly encountering the Teamsters Union's unlawful pickets at the premises of Respondent's suppliers and customers (67-8a, 71a, 88a, 128-9a, 132-3a, 257a; 79a, 80-1-2a). The Respondent's employees never knew when they might next be encountered by Teamsters Union's agents because they knew the strike activity was not being confined to the Respondent's premises. Thus, it was not necessary for the Teamsters Union to engage in actual violence.

Surely this Court will agree that the massed name calling that occurred at the primary picket line in the *Youngdahl* case was not as likely to provoke violence and threaten the public order as the unlawful secondary activity involved in this case. A non-striking employee accompanied by other non-striking employees, crossing a picket line while being subjected to name calling and indecent gestures (as happened in *Youngdahl*) is not nearly as vulnerable to actual violence as is a non-striking employee who alone leaves the primary site in a truck to be followed by strikers and to be alone encountered by other strikers at rural gravel pits.

Such intimidation and threats to the public order caused the local state court to be concerned about the public peace and order and it issued an ex parte restraining order (461a), restraining the Teamsters Union from engaging in secondary boycott activity and from following the Respondent's employees "on the public highways or elsewhere," which order was not dismissed by the state court until the seven weeks' long strike ended (482a). As held by this Court in *Youngdahl* (355 U. S. at 139), the state trial court was in a better position than any other court to assess the local situation as to whether the union's conduct was likely to provoke violence.

Accordingly, if, as the Teamsters Union argues, the pre-emption decisions of this Court are to be analyzed and categorized as to the presence or absence of intimidation and threats to the public order, this case must be placed alongside *Laburnum, Russell and Youngdahl* which involved intimidation and threats to the public order and not with *Garmon, supra, Electrical Workers Local 426 vs. Baumgartners Elec. Constr. Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 273, 91 N. W. 2d 663, and *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862, relied upon by the Teamsters Union in its petition for certiorari, which did not involve significant intimidation or threats to the public order.⁵

4. The *Garmon*, *Evening News* and *Borden* Cases.

In its decision in this case⁶ the Court of Appeals observed that a non-federal cause of action is not extinguished because a state court is preempted by federal law from providing relief. The Court of Appeals then specifically stated that it was not deciding that a state court is preempted from entertaining such a suit and awarding damages. As that Court further observed, this Court, on December 10, 1962, decided *Smith vs. Evening News*, 371 U. S. 195, holding that a Section 301, L.M.R.A. action was not subject to the preemption doctrine of the *Garmon* case. The Court of Appeals in the instant case suggested that perhaps the same considerations apply to a Section 303

⁵ The *Garmon*, *Baumgartners* and *Overnight* cases are also distinguishable from this case because those were actions in state courts whereas this one was an action in a federal district court.

⁶ Appendix B to the Teamsters Union's petition for certiorari, pages 32-3.

case. On June 3, 1963, this Court decided *Local 100 of the United Association of Journeymen and Apprentices vs. Borden*, ____ U. S. ____, 10 L. Ed. (2) 638, footnote 3 of which is as follows:

"49 Stat. 452, as amended, 28 U. S. C., Sections 157, 158. We do not deal here with suits brought in state courts under Sections 301 or 303 of the Labor Management Relations Act, 61 Stat. 156, 158, 29 U. S. C., Sections 185, 187, which are governed by federal law and to which different principles are applicable. See, e.g., *Smith vs. Evening News Ass.*, 371 U. S. 195."

The Court of Appeals in the instant case observed⁵ that it is implicit from the *Evening News* and *Borden* decisions that the *Garmon* preemption doctrine is inapplicable to both Section 301 and Section 303 actions in state courts. The Respondent submits that it is also necessarily implicit from the *Evening News* and *Borden* cases that the *Garmon* preemption doctrine is inapplicable to a Section 303 action in a federal court since state and federal courts have concurrent jurisdiction of such actions. Neither the *Garmon* nor the *Baumgartners* cases, *supra*, of course, were actions under either Section 301 or 303, L. M. R. A.

Summarizing the foregoing, and in conclusion with respect to Question I, it is submitted that:

1. The federal district court in this action had jurisdiction over the Teamsters Union as a consequence of its violation of Section 303, L. M. R. A., and therefore such court had ancillary jurisdiction to apply the state common law to award compensatory and punitive damages for violations thereof.

2. The doctrine of ancillary jurisdiction is one of general application and is not dependent upon the presence of intimidation and threats to the public order.

3. There were, however, intimidation and threats to the public order in this case and such Teamsters Union's conduct was further justification for awarding compensatory and punitive damages under state law.

QUESTION II.

Respondent's total damages were properly awarded him because such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union, (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

The Teamsters Union's statement of its second question on page 2 of its petition is, at best, erroneous. The question here is *not* whether Section 303 of the Labor Management Relations Act "authorizes an award of total actual damages for injury resulting directly from a lawful primary strike *merely* because the Teamsters Union also engaged in other conduct which was found to be in violation of Section 303." As the Teamsters Union very well knows, the district court did *not* find that the Wilson element of damages (\$9,300.00, page 5, *supra*) resulted directly from a lawful primary strike. Quite importantly, the district court found that the Wilson element of damages was suffered by the Respondent "as a result of the combination of lawful and unlawful strike activity" (i.e. secondary boycott activity) of the Teamsters Union as the result of which Respondent "had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson," thus damaging Respondent in the amount of \$9,300.00 (F. F. 11 and 12). Because the Team-

sters Union's primary picket line was not effective to hurt the Respondent to the desired degree, the Teamsters Union engaged in unlawful secondary activity (C.L. 5) and *thereafter* the combination of the primary strike activity and the secondary activity, Respondent had an insufficient number of truck drivers to perform the Wilson job. The courts below were not misled by the Teamsters Union's argument, again advanced here (pages 7 and 11 12 of its petition) to the effect that the Wilson element of damages should not have been awarded because no secondary pressure was applied on Wilson, the Respondent's customer. Liability was imposed upon the Teamsters Union because it was proven that the Teamsters Union engaged in unlawful activity; the Wilson element of damages was awarded because it was found (F. F. 11 and 12; 475a) that this element of damages was occasioned by the Teamsters Union's unlawful activity combined with the primary picket line.

The only cases here advanced by the Teamsters Union to support its argument against the "totality of effort" rule are *Chauffeurs Local 175 vs. NLRB*, 294 F. (2) 261 (C.A.D.C.) and *Milwaukee Plywood Co. vs. NLRB*, 285 F. (2) 325 (C. A. 7). The Teamsters Union argues that these cases are authority for the proposition that unlawful secondary activity does not warrant the NLRB's enjoining peaceful primary picketing. There is no question about this. Respondent, of course, could not have had the primary picket line removed as a consequence of the Teamsters Union's unlawful secondary activity and did not attempt to, although he did seek and obtain an injunction against the Teamsters Union's unlawful secondary activity. The question is *not* whether a primary picket line can be enjoined. The question is as to the *measure of damages* to be awarded as a consequence of unlawful *secondary* activity. The measure of damages applied by the lower courts

was consistent, as the Teamsters Union concedes on pages 11-12 of its petition, with *Carpenters Local 131 vs. Cisco Construction Co.*, 266 F. (2) 365 (C. A. 9) wherein certiorari was denied by this Court, 361 U. S. 828. In *Cisco* the Court of Appeals observed (266 F. (2) at 367) that the secondary activity, if it were uncommingled with the primary activity, did no substantial damage. The Court of Appeals then went on to hold that the "totality of the (Teamsters Union's) effort" should be considered and that where the totality of the primary and unlawful secondary activities damage the employer, the damages flowing from all such activity are to be awarded. The Court of Appeals in the *Cisco* case held that its decision on this point was consistent with the following four decisions of this Court:

N.L.R.B. vs. International Rice Milling Co., Inc.,
341 U. S. 665, 71 S. Ct. 961;

*N.L.R.B. vs. Denver Building and Construction
Trades Council*, 341 U. S. 675, 71 S. Ct. 943;

*International Brotherhood of Electrical Workers
vs. N.L.R.B.*, 341 U. S. 694, 71 S. Ct. 954; and

*Local 74, United Brotherhood of Carpenters vs.
N.L.R.B.*, 341 U. S. 707, 71 S. Ct. 966.

In its petition for certiorari the union in the *Cisco* case devoted over 20 pages of its brief to its argument against the totality of the effort rule and discussed at length the four decisions of this Court above referred to. Certiorari was denied.

The application of the totality of effort rule in this case is consistent not only with the *Cisco* case but also with *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862. In its

¹ Case No. 206, October 1959 term, petition for certiorari, pages 39-60.

petition⁸ for certiorari in that action the union pointed out that in the lower courts the employer had relied upon the *Cisco* case "to support the totaling of damages" and that such courts had totalled and awarded damages for legal and illegal picketing. Certiorari was denied.

We submit that the totality of the effort damage rule is entirely sound and consistent with Section 303 of the Labor Management Relations Act and the fundamental concepts of the law of damages generally. When an employer has been damaged by a combination of a union's lawful and unlawful activity, all doubts should be resolved against the wrongdoer and the employer should be permitted to recover all of his damages. The courts below so held.

The Issues in this Case are not of Importance to the Administration of the Labor Management Relations Act.

In less than two pages of its petition (pages 12-14), the Teamsters Union purports to "appraise every case arising under Section 303 in which punitive damages have been awarded." If the \$3,000,000.00 in damages the Teamsters Union finds to have been awarded by state and federal courts since Section 303 came into effect in 1947 is impressive, more impressive is the fact that as of August 24, 1960, when the petition⁹ for certiorari was filed in the *Osborne* case, *supra*, 25 cases were then pending against the United Mine Workers Union alone in just the federal courts of Tennessee, Kentucky and Virginia seeking \$24,000,000.00 in compensatory and punitive damages, in actions based upon that union's unlawful strike activities.

⁸ Case No. 292, October 1962 term, petition for certiorari, pages 13-15.

⁹ Case No. 359, October 1960 term, petition for certiorari, pages 22-23.

By comparison the \$34,000.00 in damages awarded in this action is insignificant. At the same time the Teamsters Union argues that punitive damages have never been awarded in the absence of "proven violence." As indicated above (page 11), this Court affirmed judgments against unions for compensatory and punitive damages in *Laburnum* and *Russell* where there were threats to the public order, as there were in this case, but where there was no actual physical violence. As the Court of Appeals said in this case¹⁰ if there had been actual violence here greater punitive damages may have been appropriate.

Summarizing the foregoing, and in conclusion with respect to Question II, it is submitted that:

The federal district court correctly awarded Respondent his total damages because such damages were occasioned as a result (1) solely of the Teamsters Union's unlawful strike activity, or, construing the facts most favorably for the Teamsters Union, (2) jointly of an inseparable combination of the Teamsters Union's unlawful strike activity and the Teamsters Union's primary picket line.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

M. J. STAUFFER,

165 East Washington Row,
Sandusky, Ohio,

Counsel for Respondent.

¹⁰ Appendix B to Teamsters Union's petition for certiorari, page 36.

APPENDIX.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW.
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.**

No. 8222 Civil.

**LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY,
*Plaintiff,***

vs.

**LOCAL 20, TEAMSTERS, CHAUFFEURS, AND HELPERS
UNION, an affiliate of the International Brotherhood of
Teamsters, Chauffeurs, Warehousemen and Helpers of
America, Toledo 6, Ohio,**

Defendant.

FINDINGS OF FACT.

1. At the inception of the strike hereafter described, the Plaintiff had for many years been engaged in the trucking business in Tiffin, Ohio and he engaged, among other things, in general dump truck operations in which he used his own employees to operate a fleet of approximately 50 dump trucks which were used primarily in work on highway construction. For some years prior to the year 1956 Plaintiff's drivers were members of Local 625 of the Teamsters Union, and when that Union was merged into the Defendant, those employees became members of the Defendant, and were such members throughout the period of the strike in question. There was no contract between

the Defendant and the Plaintiff prior to the strike in question.

2. In August of 1956, Plaintiff's drivers had met with representatives of the Defendant and had voted to strike in the event that the parties could not agree upon the terms of a contract. Plaintiff met with representatives of the Defendant on August 16, 1956, at the offices of the Defendant in Fremont, Ohio. No contract was concluded at that meeting and in the early morning of August 17, a large number of Plaintiff's drivers and representatives of the Defendant appeared at Plaintiff's garage and office premises in Tiffin and initiated the strike against the Plaintiff, which continued until October 5, 1956, when a contract was signed by the parties. That contract, Defendant's Exhibit D, was dated October 5, 1956, to expire March 1, 1959. At the time of the trial of this case in late April and early May of 1961, there was no contract between the parties.

3. Plaintiff's premises were struck by the Defendant on the 17th day of August, 1956, and, on August 21, 1956, pursuant to motion filed by Plaintiff in connection with the petition filed in the Common Pleas Court of Seneca County, Ohio, by the Plaintiff herein against the Defendant herein and certain business agents and members of the Defendant, that court issued a restraining order "restraining the individual defendants and each and all of them, and all persons associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

"1. * * *

"2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representa-

tives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, obstructing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

"3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent any of plaintiff's customers or any other members of the public from having business relations with the plaintiff.

"4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

"5. * * *

"6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business or any part thereof.

"7. * * *

"8. * * *." (Plaintiff's Exhibit 2.)

4. From and after the issuance of the aforesaid restraining order, Defendant observed the requirements of paragraph 6 above, in that it thereafter confined its number of pickets at each entrance to the Plaintiff's place of business to two. At no time during the strike period, to-wit, August 17, 1956 to October 5, 1956, both inclusive, was violent conduct engaged in.

5. The Plaintiff's contract to haul all of Seneca County's requirements of stone for surface treatment of the County's hardtop roads was terminated August 17, 1956 by Seneca County Engineer William Heim as a result of his learning from his road superintendent of Defendant's strike against the Plaintiff. This termination occurred

several days prior to the date Defendant's business agent Lawrence Evans called upon said county engineer and advised him of Defendant's strike against the Plaintiff. The unlawful activities of the Defendant, hereafter described, had nothing to do with the decision of the said county engineer to terminate said contract. The damages Plaintiff suffered as a result of the termination of said contract, \$2,675.33, were too remote to be considered in the computation of damages herein.

6. (a) One of Plaintiff's sources of materials at the time of Defendant's strike against him was the sand and gravel pit of the France Stone Company at Bloomville, Ohio, approximately 8 to 10 miles from Plaintiff's garage terminal.

(b) During the course of the said strike and in violation of the restraining order referred to in paragraph 3, *supra*, the Defendant encouraged the employees of the France Stone Company at its Bloomville sand and gravel pit to engage in a concerted refusal to load Plaintiff's trucks or perform other services for the Plaintiff for the purpose of requiring the France Stone Company to cease doing business with the Plaintiff and for the purpose of forcing or requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of the Plaintiff's employees.

7. (a) One of Plaintiff's customers at the time of the Defendant's strike against him was the Louis O'Connell Coal Co. of Tiffin, Ohio, which customer engaged in the business of making ready-mix concrete. At the time of the strike, Plaintiff had a contract with the O'Connell company requiring and permitting the Plaintiff to haul all of such customer's requirements of sand and gravel for such ready-mix concrete manufacturing operation.

(b) During the course of Defendant's strike against the Plaintiff, the Defendant encouraged the employees of the O'Connel company to engage in a concerted refusal to use Plaintiff's trucks for the purpose of forcing or requiring the O'Connel company to cease doing business with the Plaintiff and for the purpose of forcing or requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of Plaintiff's employees.

(c) During the same strike, the Defendant also contacted the management of the O'Connel company directly and advised it of the strike against the Plaintiff and asked the cooperation of the O'Connel company management in connection with such strike.

(d) As a result of Defendant's aforesaid activity, the O'Connel management ceased doing business with the Plaintiff for the duration of the strike.

8.(a) At the time of Defendant's strike against the Plaintiff, Launder & Son, Inc. of Toledo, Ohio, a general highway contractor, was engaged in constructing the bypass of U. S. Route 20 around Fremont, Ohio and Plaintiff, under a subcontract with Launder & Son, Inc. was doing all of the batching on such project, i.e., transporting by truck all of the dry ingredients such as sand, gravel and cement from a stockpile to a self-propelled cement mixer that mixed and laid the concrete for the highway.

(b) During the course of the strike and in violation of the restraining order referred to in paragraph 3, *supra*, Defendant contacted the management of Launder & Son, Inc. and asked that the Plaintiff's trucks not be permitted to work on such job during the strike.

(c) As a result of the Defendant's request, Launder & Son, Inc. ceased doing business with the Plaintiff and

Plaintiff did not work on such construction job after August 22, 1956, until the strike had been terminated.

9. (a) At the time of Defendant's strike against the Plaintiff, C. A. Schoen, Inc. of Toledo, Ohio manufactured asphalt paving material and was purchasing all of its requirements of sand by using Plaintiff as the hauler of that sand.

(b) During the course of the strike, Defendant encouraged the employees of C. A. Schoen, Inc. to engage in a concerted refusal to unload Plaintiff's trucks or perform other services for the Plaintiff for the purpose of requiring C. A. Schoen, Inc. to cease doing business with the Plaintiff and for the purpose of requiring the Plaintiff to recognize or bargain with the Defendant which was not certified as the representative of Plaintiff's employees.

(c) During the same strike and both before and after the issuance of and in violation of the restraining order referred to in paragraph 3, *supra*, the Defendant also contacted the management of C. A. Schoen, Inc. directly and asked such management to cease doing business with the Plaintiff.

(d) The Defendant was successful in its efforts to cause C. A. Schoen, Inc. to cease doing business with the Plaintiff until the issuance of said restraining order and continued its efforts, unsuccessfully, thereafter.

10. During the course of the strike, Defendant caused some of Plaintiff's employees who did go to work and drive Plaintiff's trucks, to be followed in automobiles by Defendant's agents and striking members. This activity had the result of discouraging return to work by an employee who did not want to drive one of Plaintiff's trucks and get followed or get hurt. Accordingly, this activity made the strike of the Defendant against the Plaintiff more

effective to prevent Plaintiff's employees from returning to work than it would have been but for such activity.

11.(a) At the time of the strike, Wilson Sand & Gravel Co. of Upper Sandusky, Ohio was supplying sand to the V. N. Holderman Co. for its job of constructing a bypass of U. S. Route 25 around Findlay, Ohio and Plaintiff had an agreement with the Wilson Sand & Gravel Co. entitling Plaintiff to haul all of such sand from the Wilson pit near Upper Sandusky, Ohio to the construction site near Findlay, Ohio.

(b) As a result of the combination of lawful and unlawful strike activity of the Defendant, Plaintiff had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson Sand & Gravel Co. and the sand that Plaintiff was accordingly unable to haul was hauled by other truckers who were obtained by the Wilson Sand & Gravel Co.

12. The special damages suffered by Plaintiff for which he should be awarded a judgment for compensatory damages herein total \$19,619.62.

13. The acts of the Defendant described at paragraphs 6(b), 7(b), 7(c), 8(b), 9(b), 9(e) and 10, *supra*, had the objective of bringing the Plaintiff to his knees and were done intentionally, maliciously and with wanton disregard of the legal rights of the Plaintiff and others.

14. The Plaintiff should be awarded a judgment for punitive damages herein in the amount of \$15,000.00.

CONCLUSIONS OF LAW.

1. On the basis of the pleadings and the entire evidence, the Plaintiff's claim that Defendant engaged in secondary activity unlawful under 29 U. S. C. A., Section 187 raises or presents a substantial federal question and consequently the Court has jurisdiction to adjudicate such claim.

2. The material and operative facts supporting the Plaintiff's federal claim of unlawful secondary activity are substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity.

3. The claim of unlawful secondary activity violative of 29 U. S. C. A., Section 187, and unlawful secondary activity violative of the common law of Ohio are not separate causes of action but are merely different grounds to support a single cause of action, the cause of action being the violation by the Defendant of Plaintiff's right to be free of unlawful interference with his business.

4. By reason of Conclusions 1, 2 and 3 above, the Court has jurisdiction of the non-federal claim of unlawful secondary activity violative of the common law of Ohio, under the doctrine of *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 86, and *UMW vs. Meadow Creek Coal Co.*, 263 F. (2) 52, cert. den. 359 U. S. 1013, and may award compensatory and punitive damages under such common law as well as under the aforesaid federal law.

5. The activities of the Defendant described in Findings of Facts paragraphs Nos. 6(b), 7(b) and 9(b), violated 29 U. S. C. A., Section 187 and the activities of the Defendant described in Findings of Facts paragraphs Nos. 6(b), 7(b), 7(c), 8(b), 9(b), and 9(c) violated the Ohio common law regarding unlawful secondary activity and

compensatory and punitive damages may be awarded to the Plaintiff accordingly.

6. As the result of the Defendant engaging in both lawful and unlawful strike activity against the Plaintiff between August 17 and October 5, 1956, the totality of Defendant's efforts may be considered and damages may be awarded the Plaintiff based upon all loss suffered as a result of Defendant's unlawful strike activity against the Plaintiff and as a result of Plaintiff's having fewer truck driving employees working during the strike than he would have had but for the combination of Defendant's lawful and unlawful strike activity against the Plaintiff.

/s/ FRANK J. KLOEB,

United States District Judge.

Toledo, Ohio.

NOV 29 1963

JOHN E. DAVIS, CLERK

No. 485

**In the
Supreme Court of the United States**

OCTOBER TERM, 1963

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION, an affiliate of the International Brother-
hood of Teamsters, Chauffeurs, Warehousemen
and Helpers of America, *Petitioner,*

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY, *Respondent.*

**PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

DAVID PREVIAINT

DAVID LEO UELMEN

212 West Wisconsin Avenue
Milwaukee, Wisconsin

Counsel for Petitioner.

**In the
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If the record in this case supported Respondent's claim that violence or a clear and present danger of violence existed during the course of the Local 20's strike (August through October, 1956), a petition for writ of certiorari would not have been filed in this case. If Respondent had not misrepresented the record in this case, this reply brief would not have been filed.

1. This case does not involve violence or a threat of violence. The theme of Respondent's brief in opposition is that Respondent's employees who worked during the strike did so under the shadow of a reign of terror. Or as Respondent put it—in italics:

“A non-striking employee accompanied by other

non-striking employees, crossing a picket line while being subjected to name calling and indecent gestures (as happened in *Youngdahi*) is not nearly as vulnerable to actual violence as is a non-striking employee who alone leaves the primary site in a truck to be followed by strikers and to be alone encountered by other strikers at rural gravel pits."

The trial of this case required about five days and extended over several weeks due to a crowded court calendar. The testimony of twenty-six witnesses is spread over a 683-page transcript. Respondent's claim of a reign of impending terror is based on one witness and one witness only. The witness—one Taulbe—was working for Respondent at the time of trial and was one of the strikers during the 1956-strike (R. 312a).

On direct examination Taulbe testified that he did not want to return to work because Local 20 had on occasion followed Respondent's trucks and "that would end up in me maybe getting hurt" (R. 315a). There is not one iota of similar evidence in the 683-page transcript of testimony.

The cross-examination of Taulbe which followed affirmatively demonstrated that there had been no violence or threat of violence. Thus, Taulbe admitted that "No one was hurt as I know of" (R. 316a), that no one was "hurt on the picket line" (R. 317a), that no trucks were damaged and no drivers were injured (R. 318a), and that his concern over "maybe getting hurt" (R. 315a) was "based on a lot of talk . . . by . . . all the guys" (R. 317a). Taulbe also admitted "I didn't support it [the strike] too much. I was mostly a bystander and the other guys talked it up, not me" (R. 317a).

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This same witness attended the secret ballot strike vote meeting and volunteered the information that he had "voted not to strike" (R. 316a).

Moreover, Respondent's driver payroll during the strike renders utterly untenable the suggestion that Respondent's employees were concerned over their physical safety. The strike commenced on August 16, 1956 (R. 239a, 256a) and ended in early October of that year (R. 256a). During that period, Respondent's driver payroll was as follows (R. 500a):

<i>"Payroll Week Ending</i>	<i>No. of Drivers</i>
"8/18	32
"8/25	20
"9/1	29
"9/8	32
"9/15	30
"9/22	33
"9/29	34
"10/6	37"

Witness Taulbe admitted that he was aware of the fact that drivers were working during the strike (R. 317a-318a). In this connection he was asked (R. 318a):

"Q. The fact of the matter is that anybody that wanted to go in or out of those premises did so without anybody interfering with him in any physical manner, isn't that true?

"A. Well, as far as I know it is. *I never seen no trouble.*" (Italics ours)

Thus, the valley of terror so eloquently portrayed in Respondent's Brief is based exclusively on the testimony of one man and that man "never seen no trouble"

(R. 318a). Indeed the findings of fact, which were prepared by Respondent, state (R. 622a):

"At no time during the strike period, to-wit, August 17, 1956 to October 5, 1956, both inclusive, was violent conduct indulged in."

In short, there is not a scintilla of evidence in the record to support a claim of violence, threat of violence or intimidation. Respondent by conclusion and insinuation cannot make it otherwise. For example, at pages 17 and 18 of his brief Respondent states:

"The Respondent's employees were *further intimidated* by repeatedly encountering the Teamsters Union's unlawful pickets at the premises of Respondent's suppliers and customers (67-68a, 71a, 88a, 128-9a, 132-3a, 257a; 79a, 80-1-2a)." (Emphasis ours)

The cited pages are attached for the convenience of the Court as an appendix to this brief. *Not one word* of testimony is to be found on those pages to support Respondent's assertion that his drivers who were working during the strike were "further intimidated" by Local 20's roving-situs pickets.

For example at one of the pages cited by Respondent, a Local 20 picket, who was picketing at a quarry, testified (R. 88a):

"Q. Now, were trucks going in and out of the France Stone Company premises on the day that you were there?

A. There was a lot of trucks going in and out of there.

* * *

"Q. Did any of those drivers turn away, refuse to go into the premises of France Stone Company when you were there with your picket sign?

A. That day?

Q. Yes.

A. No."

The foregoing is typical of the evidence of "intimidation" relied upon by the Respondent. Fairly read the record warrants the conclusion that Local 20's pickets probably were discouraged but the suggestion that the record shows Respondent's drivers were intimidated is mendacious.

Moreover, in the absence of violence or threat of violence—and there was none—a claim that peaceful picketing discourages strike-breakers, employed by the primary employer, from working for the primary employer is completely irrelevant. Sections 7 and 13 of the Act guarantee the right to strike. And this guarantee is obviously broad enough to encompass an effort to discourage, by peaceful means, non-striking employees of the primary employer from working during the strike. Indeed, the right exists independently of the Act. *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209. Throughout the history of the Act, as applied to labor organizations, the Board has recognized under the roving-situs doctrine the right of a union to follow the trucks of the primary employer to the premises of a neutral employer and to picket at the premises of the neutral employer while the truck of the primary employer was unloading. *United Plant Guards of America (Houston Armored Car Company, Inc.)*, 136 NLRB 110, 111; *Schultz Refrigerated Service*, 87 NLRB 502. In short, inducing non-striking employees of the primary employer to support a strike violates no federal law.

2. The state courts lacked jurisdiction over Respondent's state common law claim; accordingly the federal courts lacked pendent jurisdiction to entertain the claim. On August 14, 1958 Plaintiff filed a damage action in the Common Pleas Court of Seneca County, Ohio (R. 604a). The common law "secondary boycott" allegations of the complaint filed in the state court damage action (R. 604a-607a) are substantially identical to the common law violations alleged in the three complaints filed in this case (R. 7a-14a, 18a,-21a). The state court damage case was dismissed on the ground "that the Court does not have jurisdiction of the subject matter under the decision . . . in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236" (R. 610a). In view of this undisputed juridical fact, there is no occasion to speculate about the existence of state jurisdiction. There was none and the Ohio courts said so.

The twenty-odd pendent jurisdiction cases cited by Respondent on pages 11 through 13 of his brief are not in point. In each of those cases the state court had jurisdiction over the state claim; whereas in this case, the state court did not have jurisdiction over the state claim. Hence, in this case, the court below lacked jurisdiction over the state claim.

Respondent's suggestion, made for the first time in this Court, that the courts below were actually basing their decision on the presence of imminent violence is untenable. In the first place, as we have demonstrated there was no violence or danger of violence. Secondly, the district court said (R. 644a):

Although the punitive damages awarded in the *Meadow Creek* and the *Osborne* cases, *supra*, were

predicated substantially upon the extreme violence that pervaded the strikes, we can see no reason why the award of punitive damages should be limited to cases where violence was engaged in."

Thirdly, the Court of Appeals said (Pet. App. B., pg. 32):

"Defendant contends that since there was no violence in the instant case a different rule applies. We are not aware of such a distinction. . . ."

Finally, Respondent in his brief in the Court of Appeals (pg. 29) said:

"It is *indeed* the Plaintiff's theory 'that the rule of preemption does not bar federal courts from applying state law which state courts cannot apply and awarding damages based upon such state law which the state courts cannot award.' " (Italics in original)

Accordingly, it is respectfully submitted that the courts below asserted pendent jurisdiction on the theory that federal courts may entertain state claims which state courts cannot. The uniform course of decision in this Court is to the contrary. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 328; *Angel v. Bullington*, 330 U.S. 183, 191-192; *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537-538.

3. The issues presented are of general importance to the administration of the Act. Section 303 of the Act, which now incorporates Section 8(b)(4) by reference, does not condemn "secondary boycotts" rather "it describes and condemns specific union conduct directed to specific objectives. . . ." *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 98. In this case conduct which was and is not unlawful under Section 303 has been

made the basis of a federal court damage award by reliance on state law which the state courts had no jurisdiction to administer. The conduct involved consisted of Local 20 "contact[ing] the management of Launder & Son, Inc. and ask[ing] that [Respondent's] trucks not be permitted to work... during the strike" (R. 625a). Such conduct did not violate Section 8(b) (4) or 303 prior to its amendment in 1959 (*Carpenters Local 1976 v. Labor Board*, 357 U.S. 93) or as it reads today.¹ See e.g.: *Carolina Lumber Co.*, 130 NLRB 1438; *NLRB v. Local 294, Teamsters*, 298 F.2d 105; *Alpert v. Local 379, Teamsters*, 184 F.Supp. 358 (D. Mass.). Accordingly, this case presents an issue of continuing importance which is in no way affected by the 1959 amendments to the Act.

Moreover, the so-called "totality of conduct" rule invoked in this case by the courts below is judge-made law and, if legitimate, is applicable to actions under Section 303, irrespective of whether the claim arose prior or subsequent to 1959.

The Respondents would have this Court view the case as one in which the various elements of financial loss cannot be easily segregated. Yet in his accountants' exhibits (R. 475a), in Local 20's accounting exhibits (R. 515a), in the findings of fact, and in Respondents' statement of the Case, each customer account was segregated. One need not guess as to the reason Respondent lost the Wilson account for which \$9,300 damages were

¹ Section 8(b) (4) now prohibits, in addition to the inducement of "individuals," "threats, restraints or coercion" of persons if there is evidence of a proscribed object.

assessed under the totality of conduct rule. For Respondent's witness, Kent Wilson, testified (R- 229a):

"Q. Do you know why [Respondent] didn't haul pursuant to his contract?"

"A. Mr. Morton come down and told me, he says he had no drivers, and he said that he was sorry that he left me holding the bag because the purchase order didn't have anything on it about that he was going to haul."

To award substantial damages for the loss of the Wilson account is to make a mockery of Sections 7 and 13 of the Act which guarantee the right to strike.

Respondent uses the term "malicious and wanton" nine times in his brief² and the term "intimidation" eleven times,³ however, there is no evidence in the record which warrants the use of either.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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² Resp. Br., pp. 3, 4, 5, 7, 8, 9.

³ Resp. Br., pp. 2, 3, 4, 8, 17, 18, 19, 21.

APPENDIX A

EXCERPTS FROM TRANSCRIPT OF RECORD

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Testimony of John W. Combs

A. Yes, there could have been, but it has been so long ago I don't rightly remember.

Q. Yes, I understand. How did you happen to go to the France Stone Company property?

A. Well, Mr. Evans took me and my brother Joe
84 out there first and we stood picket out there.

Q. Who is Mr. Evans?

A. That is one of the union officials.

Q. Of what union?

A. The Teamsters Union, Local 20.

Q. Where is the office of that Teamster Local?

A. In Fremont, Ohio.

Q. Who else besides you and Mr. Evans went out to the property of the France Stone Company?

A. Me and my brother Joe and Mr. Evans.

Q. Joe Combs?

A. Yes, sir.

Q. Your brother?

A. Yes, sir.

Q. Did you appear first at the Morton property that day?

A. Yes.

Q. What did Mr. Evans say to you?

A. That morning he told me and my brother that we had to go somewhere and so we got in his car and he drove out to the France's rock quarry, and then out there he put me at one entrance and my brother at the other and we put up signs that Mr. Morton was on strike at both entrances.

Q. This is the day you got the court order?

A. I can't say for sure. I believe it was a day before or right after we got the court order.

85 Q. Or perhaps right after you got the court order?

A. Yes, sir, it wasn't long after.

Q. Now, you mentioned something about a sign or signs out at France's, did you not?

Testimony of John W. Combs

A. Yes, sir.

Q. Did you take those signs with you out there?

A. Yes, sir.

Q. More than one sign?

A. Yes, sir, there was.

Q. About how many signs did you take out to France's Stone Quarry that day?

A. There was a stack of signs in the car, but we just used around six of them, I would say.

Q. What did these signs say?

A. That Local 20 of Teamsters Union, to the best of my knowledge, was striking Lester Morton.

Q. Who drove the automobile out there to France's?

A. Well, I followed Larry out there in my car.

Q. You drove your own car out there?

A. Yes, sir.

Q. And Mr. Evans drove a car?

A. Yes.

Q. Was anyone else with Mr. Evans?

A. My brother Joe was with him.

Q. Joe Combs?

6 A. Yes, sir.

Q. And was anyone with you in your automobile?

A. No, I was by myself. I stayed at a different entrance to the quarry. I was over there by myself.

Q. Can you recall about what time of the day you left the Morton property for the France Stone Company?

A. I guess around ten o'clock in the morning.

Q. How far was the France Stone Company quarry from here?

A. Just guessing, I would say seven or eight miles.

Q. You drove directly there?

A. Yes.

Q. You were following Mr. Evans' automobile, were you?

Testimony of John W. Combs

A. Yes.

Q. Do you know his first name?

A. No, I don't remember it.

Q. Would it be Ransom, R-a-n-s-o-m?

A. Ransom, yes.

Q. Did anyone pass by you as you were standing there at that entrance?

A. Yes. There was trucks going in and out where I was at; practically every once in awhile one would go in or out.

Q. Did you recognize any of the people in any of those cars or trucks?

A. No, sir, I didn't.

Q. Did you speak with any of them?

A. No.

Q. Do you know about what time The France Stone Company employees quit work that day?

A. I don't know for sure, but I believe they quit around five or six o'clock. I couldn't say for sure.

Q. And I believe you testified that you did go to the other entrance before you left that day?

A. Yes, I did.

Q. What did you see there, or who did you see there?

90 A. Me and my brother and Mr. Evans was there, and our reliefs, the guys that come to stand in our place was there.

Q. So that you saw at the other entrance your brother, Joe Combs?

A. Yes, sir.

Q. Mr. Evans and Mr. Tallbee?

A. Yes.

Q. And Mr. Nye?

A. Yes.

Q. What were they doing there when you arrived?

A. I think they was just by their cars and I think they

Testimony of John W. Combs

A. I wouldn't say altogether, because I come back there lots of times when I wouldn't be on duty and I would stop and talk with them for a while.

Q. You have testified on direct examination concerning some activities at the France Stone Company. You told us that you went to that stone company with Mr. Evans and your brother Joe; do you recall that?

A. Yes, sir.

Q. And you testified that you personally and your brother Joe as well were engaged in carrying signs at the France Stone Company premises, is that right?

A. That's right.

Q. Now, were trucks going in and out of the France Stone Company premises on the day that you were there?

113 A. There was a lot of trucks went in and out of there.

Q. Whose trucks did you see there?

A. Some of Mr. Morton's trucks was there.

Q. How long after the strike began was it that you went out to France Stone Company, over a week?

A. It might have been about a week. I couldn't say for sure. It has been so long ago.

Q. In any event, at about the time you were there at the France Stone Company's premises Mr. Morton had some of his drivers driving company equipment?

A. Yes, there was some drivers still working.

Q. Did any of those drivers turn away, refuse to go into the premises of France Stone Company when you were there with your picket sign?

A. That day?

Q. Yes.

A. No.

Q. Were there any that refused to come out, that is, left their trucks and equipment at the France Quarry when you were picketing there, Mr. Combs?

Testimony of Mr. Howard Stultz

A. Yes.

Q. Did you work during the strike?

A. Yes.

Q. Did you picket at all?

A. No.

Q. Did you work on the first day of the strike?

A. Yes.

Q. What did you do that day?

A. I worked in the garage as a mechanic.

Q. You did not drive a truck that day?

A. No.

Q. Did you drive a truck at all during the strike?

A. Yes.

Q. What was the first day you drove a truck during
178 the strike; that is, how many days after the strike
began?

A. About the third or fourth day; I don't just recall
now just how many days it was.

Q. Did anyone else drive a truck that day for Morton?

A. Yes; Vernon Bean and Clifford Smith.

Q. Did you work together in a group?

A. Yes.

Q. What did you do?

.

Q. (By Mr. Stauffer) Mr. Stultz, what did you do that
day?

A. Hauled sand into Toledo.

Q. Where in Toledo?

A. To Schoen Asphalt Paving Company.

Q. You were driving dump trucks?

A. That's right.

Q. Did you leave the Morton premises loaded with sand?

A. No.

.

Testimony of Mr. Howard Stultz

Q. Where did you get the sand?

A. At Dolomite, Inc.

179 Q. Where is that located?

A. Maple Grove.

Q. And where is Maple Grove?

A. About nine miles north of Tiffin.

Q. Where is the Schoen Asphalt Paving Company located?

A. In Toledo, Ohio.

Q. You drove there that day?

A. Yes.

Q. What did you observe when you got there? Did you observe anything unusual?

A. Well, there was some automobiles setting there.

Q. There were automobiles setting where?

A. At Schoen Asphalt Paving Company.

Q. Inside the gate or on the street?

A. Outside.

Q. Did you see any people standing about the automobiles, standing by the automobiles?

A. Yes.

Q. What were they doing?

A. Just standing around the cars talking.

Q. Did you see any signs?

A. No.

Q. What did you do? Did you drive on in?

A. Yes.

Q. Then what did you do? Did you then unload your sand?

180 A. No.

Q. What did you do with your truck?

A. I left it sit.

Q. You left your truck sit?

A. That's right.

Q. What about the other two trucks?

Testimony of Mr. Howard Stultz

Q. What did that sign say, if you can recall?

A. "Morton Trucking Company on Strike," or
183 something to that effect.

Q. Was any union's name on those signs, if you know?

A. I don't know. I don't remember.

Q. Where were you hauling to when you were going in and out of the France Stone Quarry?

A. To the Route 224 bypass around Tiffin.

Q. How far from the quarry was that, approximately?

A. Approximately ten miles.

Q. How many hours a day were you working on those particular days, Mr. Stultz?

A. An average, I suppose, of about nine hours a day.

Q. How late in the day did you work on those days?

A. I suppose around between 5:30 and 6:00.

Q. What was the latest time on each of those days that you came out of The France Stone Quarry?

A. Well, it would have to be 4:30 because they close at 4:30.

Q. Do you recall whether or not you saw that picket sign on your last trip out there?

A. I don't know.

Q. Did you see anyone at the entrance standing by with a sign?

A. Yes.

Q. Was there one person there or more than one person?

A. There was two.

Q. Did you recognize either one of them?

A. One day it was the two Combs boys.

184 Q. What are their first names? Would it be Jack and Joe?

A. Yes.

Q. Who else did you recognize there with the signs?

A. And Nye.

Testimony of Mr. Howard Stultz

Q. Who is Nye?

A. He was one of the fellows on strike.

Q. He was an employee of Morton?

A. Yes.

Q. Was he the union steward, if you know?

A. I don't know if he was the union steward then or not.

Mr. Stauffer: You may cross-examine.

.

Cross-Examination, by Mr. Hafer.

Q. On the day or two, Mr. Stultz, that you saw picket lines at the France Quarry did you proceed to cross the picket line and go into the quarry to be loaded?

A. Yes.

Q. What were you picking up on that day? What was the nature of the load you were traveling with?

A. No. 1 and No. 2 stone.

Q. Did you have any difficulty getting loaded when you drove into the quarry area?

185 A. No.

Q. Was that true on both of the days you observed the pickets out there?

A. Yes.

Q. In point of distance, Mr. Stultz, how far was the picket sign that you saw from the actual quarry area where the loading was done? Was it a mile, or more or less than a mile, a half-mile?

A. That would be less than a half-mile.

Q. Could you observe from the point where the pickets were placed the actual operation of the quarry; that is, the employees in the quarry?

A. Part of it.

Q. What part of the operation could you see from that distance?

A. The part where they were loading.

Testimony of Mr. Lester Morton.

Q. During the course of the strike did you ever go to The France Stone Company?

A. Yes, I did.

Q. Did you see anything unusual on any of your trips there?

A. Yes, I did.

Q. What was that?

A. I saw a strike sign out at the entrance to the stone quarry.

Q. What did you do?

A. I got out of the car. I had my camera with me and I took a picture.

(Thereupon, the said photograph was handed to Mr. Hafer by Mr. Stauffer.)

Q. (By Mr. Stauffer) I hand you what has been marked Plaintiff's Exhibit 13, Mr. Morton, and ask you what it is.

A. That is the picture that I took.

Q. Do you know about when you took it?

376 A. I don't recall. It was next,—it was right around the 23rd or 24th, it was.

Q. Was it a few weeks after the strike began or a week?

A. It was the next week following the strike in August.

Q. Of what year?

A. 1956.

Q. There are two cars parked there. What road are they parked parallel with?

A. That is parallel with Route 19. That is a county road.

Q. Of what county?

A. A Seneca County road.

Q. What is the road that leaves that road at right angles in the photograph?

A. That is the roadway that goes into the quarry.

Q. Do you know whether that is a public or a private road?

Testimony of John W. Combs

into the quarry, but we didn't stop there. We turned around and came out and came back up there and waited while the trucks got loaded up for the trip.

Q. What did you do then?

A. We followed them into Toledo.

Q. How many trucks were there leaving the Maple Grove Quarry?

A. Three.

Q. There were still three trucks?

A. Yes.

Q. How many people were in this car you were in at that time, Mr. Combs?

A. There was four of us, counting Mr. Evans.

Q. That would be yourself, Mr. Evans, this Marcum fellow and Joe Combs?

A. Yes, sir.

The Court: The trucks were loaded with stone at the quarry?

A. Yes, sir.

The Court: With No. 8's?

A. I don't remember, sir.

Q. Is that a classification of sand?

A. Yes, sir, I think that's about what they classify it, as sand.

Q. You followed the trucks then?

101 A. Yes.

Q. And Mr. Evans was driving?

A. Yes.

Q. Was there any conversation in the car about what this was all about, what you were going to do?

A. No. We just followed them to see where they was going and we followed them into Toledo, and offhand I can't recall the name of the company they came to up here.

Q. What kind of a place was it?

Testimony of John W. Combs

A. It would be an asphalt place, I think, or blacktop mostly.

Q. You mean where they make it?

A. Yes.

Q. Would it have been The Schoen Asphalt Paving Company?

A. Yes.

Q. And you were following the trucks, Morton's three trucks to Toledo?

A. Yes.

Q. And you say that Mr. Evans was driving the car?

A. Yes, sir.

Q. What happened when you got there?

A. Well, we came up and,—

Q. (Interposing) Where did you stop?

A. Right out from the office there.

Q. Did you stop on the Schoen premises, if you
102 know or remember, or did you stop down the street,
or where?

A. We stopped right in front of the Schoen place. It would be close to it. I couldn't say for sure because it has been so long.

Q. Then what happened there at that time?

A. Then my brother Joe got out and he had one of the signs.

Q. What did the sign say, if you know?

A. It said that Morton and Teamsters Local 20 were on strike.

Q. Did you get out of the automobile?

A. I didn't get out. Mr. Evans talked to somebody, but I didn't hear the conversation.

Q. Then what happened, do you remember?

A. The trucks didn't get unloaded.

Q. How do you know that?

A. Well, Mr. Morton brought his drivers back and we

Testimony of John W. Combs

followed them almost back into Tiffin. They left the trucks there.

Q. Mr. Morton also drove to Schoen Paving Company in Toledo?

A. He was there a little while later, but I didn't see him when we pulled up. I couldn't say if he got there just before or after we got there.

Q. But you saw that the drivers left?

A. Yes.

Q. Did they leave in their trucks?

A. No.

Q. How did they leave?

A. In a car.

103 Q. Who was driving that car, if you recall?

A. It has been so long ago that I couldn't say for sure.

Q. Do you recall whose car it was or who was in it?

A. Well, I know Beany and Howard was there.

Q. Howard Stultz and Vernon Bean?

A. Yes.

Q. Two of the three truck drivers?

A. Yes.

Q. Was anybody else in that car? Was the third truck driver in that car?

A. Yes, I think he was in it, and Mr. Morton.

Q. Mr. Morton was in that car?

A. Yes, sir. To the best of my knowledge, those were the four in the car.

Q. What did you do while you were there at the gate of Schoen Asphalt Paving Company?

A. Well, my brother, he got out with a picket sign, but I didn't get out of the car. I stayed in the car. I opened the door once and got almost out and stood by the car a little while and then got back in the car. I didn't go away from the car.

Testimony of John W. Combs

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Testimony of John W. Combs

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Testimony of John W. Combs

Q. What did you see your brother Joe do?

A. He got a picket sign out when he got out of the car with him; I think him and James, both.

Q. James Marcum?

A. Yes.

104 Q. They each got a sign?

A. Yes.

Q. What did they do with them?

A. They walked up to the gate entrance to the place and was there with the signs, just the same as walking picket.

Q. Did you see those signs?

A. Yes.

Q. What did they say, these signs?

A. That Local 20 Teamsters were on strike against Lester Morton's. To the best of my knowledge that is what they said.

Q. About how long were you there?

A. Right offhand I guess about an hour. I couldn't say for sure. It has been so long ago.

Q. You left after the three truck drivers and Mr. Morton left, is that it?

A. Right after they left, yes.

Q. When you left did you see those three trucks, before you left and after the drivers had left?

A. After they left?

Q. Yes.

A. Yes.

Q. Were those trucks then loaded or unloaded?

A. Loaded.

Q. The trucks were still loaded when you left?

A. Yes.

105 Q. Do you know of your own knowledge what happened to those trucks later?

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FILED

MAR 5 1964

JOHN F. DAVIS, CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1963

No. 485

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION,
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vs.

**LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY, *Respondent*.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITIONER'S BRIEF

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1963

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND
HELPERS UNION, an Affiliate of the In-
ternational Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Help-
ers of America,**

Petitioner,

No. 485.

vs.

**LESTER MORTON, d/b/a LESTER MORTON
TRUCKING COMPANY,**

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of District Court (R. 276-290) is reported 200 F.Supp. 653. The opinion of the Court below (R. 291-296) is reported in 320 F.2d 505.

JURISDICTION

The judgment of the Court below was entered on July 25, 1963. The petition for writ of certiorari was filed on September 20, 1963 and was granted on December 9, 1963. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of preemption of labor disputes bars a federal court from exercising pendent ju-

jurisdiction to award actual and punitive damages based upon alleged violations of state common law where as here the alleged violations do not arise under Section 303 of the Taft-Hartley Act and where as here the doctrine of preemption bars state courts from awarding either actual or punitive damages based upon such alleged violations of state law.

2. Whether Section 303 of the Taft-Hartley Act authorizes an award of total actual damages for injury resulting directly from a lawful primary strike merely because the Union also engaged in other conduct which was found to be in violation of Section 303.

STATUTE INVOLVED

The statutory provision involved is Section 303 of the Labor-Management Relations Act of 1947, 61 Stat. 158, 29 USC, Section 187 (referred to as the "Act"). It is printed in Appendix A, *infra*, pp. 49-50. Although certain amendments to Section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 USC Sec. 187, such amendments are not germane to the questions presented in this case.

STATEMENT

The Petitioner, Local 20, Teamsters, Chauffeurs, and Helpers Union (referred to as "Local 20") is a labor organization and has its principal office in Toledo, Ohio (R. 95, 100). Respondent Lester Morton, d/b/a Lester Morton Trucking Company (referred to as "Respondent") is engaged in the operation of dump trucks and maintains his principal place of business in Tiffin, Ohio (R. 180).

In this case the courts below have asserted jurisdiction under Section 303 of the Act, and awarded damages in the amount of \$1,600 based upon conduct found unlawful under Section 303. An additional \$9,300 damages were awarded "under the totality of effort rule" (R. 284) even though Respondent has conceded that "there is no evidence of an unlawful activity in connection with" such loss (R. 166). Moreover the courts below have asserted "pendent" jurisdiction to award \$8,700 actual and \$15,000 punitive damages based upon "the Ohio common law regarding unlawful secondary activity" (R. 275-276). Pendent jurisdiction over this state claim was asserted notwithstanding: (1) the finding that Local 20's conduct was at all times peaceful (R. 282); and (2) the prior determination of the Ohio courts that such state courts had no jurisdiction to entertain Respondent's claim of common law secondary boycott (R. 266). The facts are set forth below.

(A. The Primary Strike)

Local 20 represented Respondent's employees from 1950 until 1956 under an oral agreement (R. 18-19, 30-31). During 1956 Local 20, in an effort to secure a written agreement held a series of meetings with Respondent (R. 20-21, 25-26, 185, 188-192, 201-209, 229-230). During the course of these negotiations an impasse developed over Respondent's demand that any written agreement be conditioned upon Local 20 securing similar written agreements covering Respondent's competitors (R. 34-36, 40, 204, 205-207, 233, 241, 251-252, 253-260). This impasse precipitated a strike

which commenced on April 17, 1956 (R. 180, 185) and terminated in early October, 1956 (R. 185) when Respondent entered into a written contract with Local 20 (R. 188-189).

Local 20 engaged in peaceful picketing at Respondent's premises during the course of the strike (R. 25-26, 45-46, 63-64, 222-224). There was no interference with ingress or egress at any time during the strike (R. 37-38, 63-64), and no physical injury to person or property occurred (R. 37-38, 197-199, 271, 282). Some of Respondent's employees worked on the first day of the strike and continued to work through the strike (R. 82-83, 91, 222, 224, 252). In addition new employees were hired during the strike (R. 224).

(B. The State Common Law "Secondary Boycott")

During the strike, Local 20 engaged in certain conduct which according to the District Court and the Court of Appeals, constituted a "secondary boycott" under the law of Ohio (R. 275-276, 292). The four suppliers or customers involved and the facts relating to each, as determined by the lower courts, are as follows:

(1. Launder Account)

At the time of the strike Respondent was hauling ingredients for cement to be used in connection with a highway construction project. Respondent was performing this work under a subcontract from Launder & Sons, Inc. (referred to as "Launder") (R. 273). During the course of the strike Local 20 requested the management of Launder to refrain from using Respondent's trucks (R. 273). As a result of this request

Laundry ceased doing business with Morton until the strike was ended (R. 273). Damages in the amount of \$8,700* were awarded by the District Court (R. 289) and this award was affirmed by the Court of Appeals.

(2. O'Connell Account)

According to the courts below Local 20 requested the cooperation of the management of the Louis O'Connell Coal Co. (referred to as "O'Connell") and encouraged O'Connell's employees to engage in a concerted refusal to "use" Respondent's trucks for the purpose of causing O'Connell to cease doing business with Respondent (R. 272). As a result, O'Connell ceased doing business with Respondent for the duration of the strike (R. 273). Damages in the amount of \$1,600 were awarded by the District Court and this award was affirmed by the Court of Appeals (R. 289, 295).

(3. France & Schoen Accounts)

The courts below also found that Local 20 encouraged the employees of France Stone Company (referred to as "France") and the employees of C. A. Schoen, Inc. (referred to as "Schoen") to engage in a "concerted refusal to load" Respondent's trucks for the purpose of requiring France (R. 272) and Schoen (R. 273) to cease doing business with Respondent. It is undisputed that there was no work stoppage or slowdown by either France (R. 51, 66-67, 80, 100, 107) or Schoen (R. 71-72) employees. No damages were claimed (R. 141, 249) or awarded (R. 273) in connection with the alleged inducement of the France and Schoen employees.

*References to damages will be made in round figures.

Compensatory damages of \$10,300 (Lauder \$8,700 and O'Connell \$1,600) and punitive damages in the amount of \$15,000 were awarded by the District Court on the theory that Local 20 by the conduct set forth above "violated the Ohio common law regarding unlawful secondary activity" (R. 275-276). The District Court's theory of liability and its award of damages were approved by the Court of Appeals (R. 295-296). The District Court and the Court of Appeals thought it immaterial that: (1) Local 20's conduct giving rise to the claim of common law secondary boycott was peaceful (R. 289, 292-293), and (2) the state courts of Ohio had previously held that such state courts were without jurisdiction to award damages based upon Respondent's claim of common law secondary boycott (R. 293).

(C. The Alleged Section 303 Violations)

(1. O'Connell, France & Schoen Accounts)

The court's below also concluded that Local 20's conduct in connection with France (no damages), Schoen (no damages) and O'Connell (\$1,600 damages) violated Section 303 of the Act. Viewed most strongly in Respondent's favor, the evidence with regard to O'Connell shows only that Local 20 advised its steward employed by O'Connell of the strike against Respondent and requested him to refrain from using Respondent's trucks (R. 122). The steward had no occasion in the course of his employment to operate Respondent's trucks and had no authority to terminate Respondent's relation with O'Connell (R. 124). Accordingly, the steward reported his conversation to the O'Con-

nell management (R. 122-126). Upon learning that a strike had been called against Respondent the O'Connell management arranged for other trucking services (R. 127). There were no strikes, picketing or threats of strikes or picketing against O'Connell (R. 129).

(2. Wilson Account)

Prior to the strike, Respondent was performing work for Wilson Sand & Gravel Co. (referred to as "Wilson"). Respondent conceded that there is "no evidence of an unlawful activity in connection with this particular job" (R. 166). It is undisputed that the Wilson work was lost for the duration of the strike because of a lack of drivers during the strike (R. 171, 173, 184). Compensatory damages in the amount of \$9,300 were awarded because of the loss of revenue from Wilson. The District Court assessed these damages "under the totality of effort rule" (R. 284). Although Local 20 devoted one-third of its brief in the Court of Appeals to an attack upon the "totality of effort rule" the Court of Appeals affirmed the District Court without addressing itself to this issue.

Local 20's petition for writ of certiorari has been granted.

SUMMARY OF ARGUMENT

A peaceful strike by Respondent's employees, who were represented by Local 20, occurred in 1956. During the course of the strike Local 20 engaged in certain conduct which violated no federal law. However, this peaceful conduct was said to be unlawful under Ohio common law and the courts below have awarded sub-

stantial compensatory and punitive damages under Ohio common law. The jurisdiction of the courts below to award compensatory damages for injury proximately caused by conduct which is unlawful under Section 303 of the Act is not in issue. But the jurisdiction of the courts below to award either actual or punitive damages under Ohio common law is in issue.

Repeatedly this Court has held that the National Board alone is authorized to regulate peaceful picketing and boycott activities. See *e.g. Garner v. Teamsters*, 346 U.S. 485. On a cogently similar record, this Court reversed *per curiam* an award of compensatory and punitive damages which the state courts thought justified by state common law. *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498. In *Baumgartners* case the plaintiff could have but did not rely upon Section 303; rather, in *Baumgartners* case the plaintiff based his case upon state law. In this case most of the damages which were awarded were said to be authorized under state law. Here, as in *Baumgartners* case, the doctrine of preemption (*i.e.* exclusive National Board authority) bars recovery of such damages.

It is of no significance that the courts below are empowered to award actual damages for injury caused by conduct unlawful under Section 303, for here we are concerned with conduct which did not violate Section 303. Moreover, even if the case were viewed only in terms of Section 303, it nevertheless should be concluded that Section 303 has displaced state law. When Congress enacted Section 303 it intended to assure "uniformity, otherwise lacking, in rights of recovery

in the state courts. . . ." *United Construction Workers v. Laburnam*, 347 U.S. 656, 665-666.

Peaceful picketing and boycott activities are comprehensively regulated by Sections 8(b)(4) and 8(b)(7) of the Act. Congress debated at length not only the question of the type of conduct to be made the subject of damage actions, but also the measure of damages to be allowed. In short, this is an area "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes rather than local law." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Since state law has been displaced by Section 303, insofar as private damage actions based upon peaceful picketing and boycott activities are concerned, the courts below were without authority to award actual and punitive damages under state law principles.

The decisions of this Court and decisions of the Ohio courts rendered in connection with this dispute, make it clear that the Ohio courts had no jurisdiction to award damages against Local 20. Yet the courts below by a reasoning process which may be characterized as bootstrap-pendent jurisdiction, concluded that there reposed in the federal courts authority to award damages under preempted, non-existent state law. It is sufficient for present purposes to note that if a state court has no authority over a given claim, then it must be held that a federal court exercising pendent or diversity jurisdiction is similarly without jurisdiction. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 328.

The final point to be considered is the "totality of efforts rule" applied by the courts below. In this case the courts below held that Local 20 engaged in conduct at the premises of three of Respondent's customers which violated Section 303. With respect to two of these, no damages were claimed or awarded. Damages in the amount of \$1,600 were awarded in connection with the third account (i.e. O'Connell account).

There is no finding, however, that Local 20 by violation of either state or federal law, caused Respondent to lose the Wilson account for which \$9300 damages were awarded on the theory of "totality of efforts." It is undisputed that Respondent himself advised Wilson of the strike against Respondent and further advised Wilson that because of the strike Respondent would be unable to perform hauling work for Wilson. Indeed, during the course of the trial, Respondent conceded that there is "no evidence of an unlawful activity in connection with this particular job. . . ." (R. 166).

Primary strikes are protected by Sections 7 and 13 of the Act as well as by the First Amendment to the Federal Constitution. If this protection is to have meaningful content, injury which results from primary strikes must be considered *damnum absque injuriam*.

ARGUMENT

I. The Doctrine of Federal Preemption of Labor Disputes Bars a Federal Court from Exercising Pendent Jurisdiction to Award Actual and Punitive Damages Based Upon Alleged Violations of Common Law Where, as Here, the Alleged Violations Do Not Arise Under Section 303 of the Taft-Hartley Act and Where, as Here, the Doctrine of Preemption Bars State Courts from Awarding Either Actual or Punitive Damages Based Upon Such Alleged Violations of State Law

The dispute out of which this case arose was the subject of damage suits, both in the state courts of Ohio and in the courts below. Throughout the course of this litigation the concept of "jurisdiction" has received important attention. The terms "preemption," exclusive "primary" jurisdiction and "pendent" jurisdiction frequently appear in the record, opinions and briefs of counsel. As labels these terms are useful, but resolution of the issues before this Court obviously cannot be accomplished by appending a label and analyzing the case in light of the particular set of rules associated with the label. Rather as Professor Summers explained, "The critical inquiry is what allocation by the Court will achieve the substantive results sought by Congress."¹

As we shall demonstrate, Congress intended that, in the absence of violence, the sole and exclusive authority to award damages in favor of an employer on account of union picketing and boycott activity during the course of a labor dispute is embodied in Section 303 of the Act. This result obtains irrespective of whether

¹ Summers, "Labor Decisions of the Supreme Court 1962 Term," 1963 Report ABA Section of Labor Relations Law at pg. 5.

the case is analyzed in terms of the "primary jurisdiction of the National Board" (*San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 245) or in terms of the congressional intent, in enacting Section 303, to assure "uniformity, otherwise lacking, in rights of recovery in the state courts. . . ." (*United Construction Workers v. Laburnam*, 347 U.S. 656, 665-666) or in terms of "pendent" jurisdiction (Cf. *Lauf v. E. G. Skinner & Co.*, 303 U.S. 323, 328). Moreover, we shall demonstrate that Section 303 contemplates an award of *compensatory* damages for injury proximately resulting from conduct which violates Section 303; no other damages are recoverable. Congress did not and constitutionally could not have contemplated an award of damages for injury proximately resulting from lawful, primary strike activities (*Teamsters Local 795 v. Newell*, 356 U.S. 341 reversing *per curiam* 181 Kan. 898, 317 P.2d 817). The judgment below is at war with these principles.

- A. Two-thirds of the damages awarded in this case are based upon a finding that Local 20 engaged in a state common law secondary boycott. Such damages are not based upon and cannot be sustained under Section 303 of the Act.**

It will be recalled that during the course of Local 20's strike against Respondent, Local 20 "contacted the management of Launder . . . and asked that [Respondent's] trucks not be permitted to work . . . during the strike" (R. 273). As a result of this request Launder "ceased doing business with" Respondent "until the strike had been terminated" (R. 273). Compensatory damages in the amount of \$8,700 were

awarded (R. 289) on the theory that this conduct "violated the Ohio common law regarding unlawful secondary activity" (R. 275-276).

In addition, the courts below concluded that Local 20's peaceful conduct at the France premises, the Schoen premises and the O'Connell premises violated the Ohio common law (R. 275-276). Punitive damages in the amount of \$15,000 were awarded solely on the ground that Local 20's activities set forth above constituted a secondary boycott *unlawful under the Ohio common law* (R. 275-276).² Thus \$23,000 (Launder—\$8,700 and punitive \$15,000) of the \$34,000 damages awarded are based solely on the claim that Local 20 "violated the Ohio common law regarding unlawful secondary activity . . ." (R. 275-276).

Considering first the award of \$8,700 for loss of the Launder account, it is indisputable that such award was not and could not be based upon Section 303 of the Act. The district court *expressly* predicated its award of the Launder damages upon Ohio common law (R. 273, 275-276). Respondent has not at any time contended that the compensatory damages awarded for the loss of the Launder account could be awarded under Section 303. Indeed, during oral argument in the court

²No *compensatory* damages were claimed (R. 141, 249) or awarded (R. 273) because of the picketing at either Schoen or France. Compensatory damages, in the amount of \$1600, were awarded in connection with the O'Connell account. Since, however, the O'Connell damages were held to be recoverable under Section 303, as well as the Ohio common law, we have treated Respondents' right to such *compensatory* damages in connection with our discussion of the principles peculiarly applicable to Section 303. Our purpose at this point is to isolate those portions of the damage award based *solely* upon the Ohio common law.

below. Respondent conceded that such damages could not be awarded under Section 303.

Any possible claim for damages under Section 303, in connection with the Launder account, is totally foreclosed by *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 98-99, where this Court said:

"A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute."

Although this case arose under the Act as amended in 1947, the subsequent amendments of 1959 have not altered the rule set forth in the *Local 1976* case. See, e.g.: *Carolina Lumber Co.*, 130 NLRB 1438; *NLRB v. Local 294 Teamsters*, 298 F.2d 105 (CA 2); *Alpert v. Local 379, Teamsters*, 184 F.Supp. 358 (D. Mass.). Thus, it is clear that the compensatory damages awarded for loss of the Launder account were not and could not be based upon Section 303.

Similarly, the district court expressly based its award of punitive damages upon the Ohio common law (R. 275-276). To date, Respondent has not suggested that punitive damages are authorized by Section 303. Such a suggestion, if made, would be wholly lacking in merit. The Act itself provides that, "Whoever shall be injured in his business or property by reason of any violation" of Section 303 "Shall recover the damages by him sustained . . ." (29 U.S.C. Sec. 187(b)). This is not the language of punitive damages. Compare, for

example, the Sherman Anti-Trust Act, 15 U.S.C. Sec. 15, which provides for treble damages, costs and a reasonable attorney's fee. During the course of the deliberations in the Senate, when Section 303 was being debated, Senator Taft specifically alluded to this difference between Section 303 and the Sherman Anti-Trust Act. In response to Senator Morse's claim that Section 303 would impose virtually unlimited liability Senator Taft said (2 Leg. Hist. 1398):

"Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case we simply provide for the amount of the actual damages."³

The courts which have squarely ruled upon the right to punitive damages in Section 303 actions have held that Section 303 does not authorize an award of punitive damages. *United Mine Workers v. Patton*, 211 F.2d 742, 747-750 (CA 4); *Overnight Transportation Co. v. Teamsters*, 257 N.C. 18, 125 S.W. 277, cert. denied 371 U.S. 862. Cf. *Harvey Aluminum v. Longshoremen's Union*, 278 F.2d 63 (CA 9).

The language of Section 303, its legislative history and the decided cases are in agreement; Section 303 does not contemplate an award of punitive damages. Hence, the award of punitive damages in this case — which the district court awarded under the Ohio common law — cannot be justified by reference to Section 303 of the Act.⁴ The \$8,700 compensatory damages

³ A boycott damage amendment offered by Senator Ball which provided for reasonable attorneys' fees (2 Leg. Hist. 1324), was amended to delete such awards (2 Leg. Hist. 1346) and then defeated entirely (2 Leg. Hist. 1370). See also: 1 Leg. Hist. 168-171, 204-206.

⁴ During the trial in the district court Respondent said, "Our claim for

awarded for loss of the Launder account and the \$15,000 punitive damages were based upon and can be justified only by reliance upon Ohio common law. As we shall demonstrate, there is no place in the federal labor law scheme for state common law notions.

B. The rule of federal preemption (i.e. exclusive primary jurisdiction of the Labor Board) prohibits federal and state courts from awarding damages against unions unless the conduct involved violates Section 303 of the Act.

Later on we will address ourselves directly to the suggestion that the doctrine of primary, exclusive jurisdiction of the Labor Board is *ipso facto* unavailable in a Section 303 action. For present purposes it is sufficient to note that Local 20 does not and has not argued that federal or state courts are deprived of authority to hear evidence and award compensatory damages

punitive damages lies almost entirely upon the fact that the defendant intentionally and wilfully violated a state court order that was in effect throughout the strike" (R. 452a-453a).^{*} Local 20 in its post-trial brief pointed out that a federal court has no authority to punish a party for violation of a state court order. 1 Beach on Injunctions, Sec. 277 (1895); *Kirk v. Milwaukee Dust Collector Manfg Co.*, 26 Fed. 501, 506 (E.D. Wis.); *Wilson v. United States*, 26 F.2d 215, 218 (C.A. 8); *United States v. Berry*, 24 Fed. 863, 868-869 (E.D. Mich.). Local 20 also pointed out that since the Ohio courts had held the subject matter of the dispute to be pre-empted (R. 266), the state court order was void. *In re Green*, 369 U.S. 689. Cf. *Ex parte George*, 371 U.S. 72. After the District Court issued its opinion, Respondent filed findings of fact and conclusions of law asserting that punitive damages were proper since an unlawful common law secondary boycott has been established. This was the theory urged in the court below by Respondent (Appellee's Br., pp. 24-26). The argument appears under a caption entitled "Punitive Damages Are Recoverable for Malicious Torts Under the Common Law of Ohio". Respondent's brief in opposition filed in this Court suggests that Respondent will seek to justify the award of punitive damages in this case on the ground that violence was involved. But in view of the Respondent's illusive theory of punitive damages, we will await his brief on the merits before discussing the point further.

^{*}This reference is to the certified record filed in this Court.

based upon conduct which the court determines to be *illegal under Section 303*. But Local 20 has consistently asserted that where, as here, a state or federal court in a Section 303 action determines that certain conduct does not violate Section 303, such court is without jurisdiction to invoke *state law* and award damages. Local 20 also has consistently asserted that in the absence of violence, neither state nor federal courts have jurisdiction to award punitive damages based upon either Section 303 or state law principles. In other words, Local 20 challenges in this case an award of compensatory damages (Launder account) and an award of punitive damages which were awarded not under Section 303 of the Act, but under state common law principles. The award of such damages plainly trespasses on the National Board's exclusive jurisdiction.

The range of the Labor Board's exclusive, primary jurisdiction is broad indeed. For example, primary strikes for initial recognition⁵ or a new contract⁶ are subject to the rule of pre-emption. Even contemporaneous violence will not permit the courts to regulate peaceful conduct in the course of the same dispute.⁷ Picketing, though carried on in the absence of a "labor dispute" or for an unlawful purpose as defined by state law, also falls within the Labor Board's exclusive jurisdiction.⁸ The same is true of picketing allegedly vio-

⁵ *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62.

⁶ *Amalgamated Ass'n v. Missouri*, 10 L.Ed.2d 763; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *Amalgamated Ass'n v. Wis. E.R. Bd.*, 340 U.S. 383; *UAW v. O'Brien*, 339 U.S. 454.

⁷ *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131.

⁸ *Hotel Employees Union v. Sax Enterprises, Inc.*, 358 U.S. 270; *Machinists Lodge 34 v. L. P. Cavett Co.*, 355 U.S. 39; *San Diego Bldg.*

lating a state "right to work" law⁹ even though the states have express authority to prohibit union security agreements.¹⁰ Picketing which induces employees of trucking firms to refuse to make deliveries,¹¹ which seeks to induce a consumer boycott,¹² to induce a breach of contract¹³ or which is carried on at a construction job site¹⁴ likewise constitutes conduct within the Labor Board's exclusive jurisdiction.

Assume for the moment that Respondent had filed a complaint merely alleging that Local 20 had engaged in a common law secondary boycott by contacting the Launder management, and assume that the complaint prayed for compensatory and punitive damages. Surely an award of actual and punitive damages based upon such allegations would be summarily reversed on the ground that the National Board had exclusive jurisdiction. *Electrical Workers Local 426 v. Baumgart-*

Trades Council v. Garmon, 353 U.S. 26; *Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20; *Retail Clerks Union v. J. J. Newberry Co.*, 352 U.S. 387; *Garner v. Teamsters Union*, 346 U.S. 485.

⁹*Local No. 438 v. Curry*, 371 U.S. 542; *Farnsworth v. Chambers Co.*, 353 U.S. 969.

¹⁰*Retail Clerks v. Schermerhorn*, 10 L.Ed.2d 678 and 11 L.Ed.2d 179. Compare: *Teamsters Local 24 v. Oliver*, 358 U.S. 283.

¹¹*Teamsters Local 327 v. Kerrigan Iron Works, Inc.* 353 U.S. 968; *General Drivers Local 89 v. American Tobacco Co.*, 348 U.S. 978; *McGrary v. Silladin Radio Indus., Inc.*, 355 U.S. 8.

¹²*Retail Clerks Local 560 v. J. J. Newberry Co.*, 352 U.S. 987.

¹³*Ex parte George*, 371 U.S. 72; *Marine Engineers Ben. Asso. v. Interlake S.S. Co.*, 370 U.S. 173.

¹⁴*Linet v. Jafco*, 11 L.Ed.2d 347; *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498; *Plumbers Union Local 298 v. Door County*, 359 U.S. 354; *Pocatello Bldg. & Construction Trades Council v. Kinard Constr. Co.*, 346 U.S. 933.

ners Elec. Construct. Co., 359 U.S. 498, reversing *per curiam* 77 S.D. 286, 91 N.W.2d 663. Yet the courts below on indistinguishable facts awarded compensatory and punitive damages, and in doing so trespassed upon the Labor Board's domain.

Cases involving violence and mass picketing are in no way inconsistent with the decisions under consideration, nor are such cases factually apposite. This Court repeatedly has sustained the right of the several states to regulate violence and mass picketing.¹⁵ State authority to regulate such conduct has been recognized because Congress so intended. *United Construction Workers v. Laburnam*, 347 U.S. 656, 666-670.

The well-defined distinction between cases involving peaceful picketing and boycott activities, with respect to which state law has been extinguished, and cases involving mass picketing and violence, in which state authority is recognized, is emphasized by this Court's decision in *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498. In the *Baumgartners* case the state court sustained an award of actual and punitive damages based on peaceful picketing at certain construction job sites. The picketing resulted in work stoppages by employees of secondary employees. These work stoppages in turn resulted in the loss of certain work by the Baumgartner firm. As the state court itself noted, the plaintiff in *Baumgartners* case could have (91 N.W.2d at 669) but did not make a "[r]equest for application of Sec. 303, 61 Stat. 158, 159,

¹⁵ *Auto Workers v. Russell*, 356 U.S. 634; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131; *Auto Workers v. Wis. E.R. Board*, 351 U.S. 266; *United Construction Workers v. Laburnam*, 347 U.S. 656; *Allen Bradley Local 1111 v. Wis. E.R. Board*, 315 U.S. 740.

29 U.S.C.A. Sec. 187(b) . . . " (91 N.W.2d at 670). Rather, the plaintiff based its case on the state right to work law (91 N.W.2d at 666). Rejecting the union's claim of preemption, the state court stated (91 N.W.2d at 670):

"The defendants contend that the Congress having preempted the jurisdiction of the courts to grant equitable relief against the exhibited conduct of defendants, it must have intended to preempt the jurisdiction of the state courts to impose sanctions by way of damages for injuries to business resulting from that conduct.

"It is our understanding that the Supreme Court has expressed a contrary view in *United Construction Workers v. Laburnum Construction Corporation*, 347 U.S. 656, and in *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, et al. v. Paul S. Russell*, 356 U.S. 634. And see *San Diego Building Trades Council v. Garmon*, 353 U.S. 26, and *Garmon v. San Diego Trades Council*, — Cal. —, 320 P.2d 473. Therefore, we hold the contention to be inadmissible."

On writ of certiorari this Court reversed, *per curiam*, citing *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236.

In *Garmon*—an action in which state law was relied upon to justify an award of damages for losses resulting from peaceful picketing and boycott activities — this Court said (359 U.S. at 245, 246-247):

"When an activity is arguably subject to Sec. 7 or 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger

of state interference with national policy is to be averted.

* * *

"Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

In *Garmon* this Court made it clear that violence cases were *sui generis*; for in such cases the "question to which review [had been granted] was restricted by the 'type of conduct' involved, i.e. 'intimidation and threats of violence.'" 359 U.S. at 248.

There was no violence or threat of violence in this case. There was no mass picketing. There was no interference with ingress or egress.¹⁶ In short here, as in the *Garmon* and *Baumgartners* cases, damages based on peaceful union conduct have been awarded under state law. As in *Baumgartners* and *Garmon*, the award of damages should be set aside.

¹⁶Respondent in his brief in opposition filed in this case argued — for the first time — that this case actually involved violence and intimidation, within the meaning of *Laburnum*. Since this contention is discussed in some detail in Local 20's reply brief and may or may not be renewed in Respondent's brief on the merits, we will for the present limit ourselves to the case as made in the district court and the court below.

C. When Congress enacted Section 303 it created a federal cause of action for actual damages; but except as to conduct therein defined as unlawful, Congress intended that damages would not be allowed for peaceful picketing and boycott activities.

At the outset we again point out that cases involving violence constitute a recognized exception to the principles under consideration. This case does not involve violence; hence such cases are not germane.¹⁷ We are concerned, however, with a case in which Section 303 was invoked, compensatory damages awarded for conduct which did not violate Section 303, and punitive damages—which are not contemplated by Section 303—awarded. The argument which follows concerns itself with those damages.

The court below apparently thought it “implicit” in *Smith v. Evening News*, 371 U.S. 195, and *Local 100; Plumbers, v. Borden*, 10 L.Ed.2d 638, that “the preemption doctrine” is inapplicable “insofar as both Sec. 301 and Sec. 303” are concerned (R. 293). The court below cast the quoted comment in the form of a rhetorical question which cannot be answered without first defining the term “preemption.”

Section 301¹⁸ and Section 303¹⁹ actions can be commenced in either state or federal court. In a Section 301, breach of contract suit, contract issues virtually identical in substance to unfair labor practice issues

¹⁷Nor are we dealing with a foreign flag vessel. *Inces. S.S. Co. v. Maritime Workers Union*, 372 U.S. 24; *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138.

¹⁸*Doud Box Co. v. Courtney*, 368 U.S. 502.

¹⁹Section 303(b) specifically authorizes “any court having jurisdiction of the parties” to entertain a case brought under Section 303.

may and often do arise. See *e.g.* *Carey v. Westinghouse Corp.*, 11 L.Ed.2d 320. But since Congress has given state and federal courts jurisdiction over such contract issues, the doctrine of exclusive National Board jurisdiction does not bar the suit. *Smith v. Evening News*, 371 U.S. 195. Similarly in every Section 303 boycott-damage action the issues—except for measure of damages—are identical to the issues in a National Board case under Section 8(b)(4). Obviously, since Congress gave state and federal courts jurisdiction to entertain Section 303 actions, the doctrine of exclusive National Board jurisdiction does not bar the suit.

This case,²⁰ however, *does not involve* conduct which is unlawful under Section 303. This case *does not involve* an award of compensatory damages under Section 303. This case does involve an award of compensatory and punitive damages under the common law of the State of Ohio. These incompatible rules of state common law have no role to play in the federal scheme.

“[A] main goal of Section 301 was precisely to end ‘checkerboard jurisdiction,’ *Seymour v. Schneckloth*, 368 U.S. 351, 358” (*Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 27); just as a main goal of Section 303 was to assure “uniformity, otherwise lacking, in rights of recovery in the state courts . . .” *United Construction Workers v. Laburnum*, 347 U.S. 656, 665-666. In other words, in a Section 301 or Section 303 action federal law alone controls; liability cannot be imposed under state law because state law has been totally displaced.

²⁰At this juncture, only the common law compensatory and punitive damages are under discussion.

Cf.: *Machinists v. Central Airlines*, 10 L.Ed.2d 67, 75-76 fn. 17.

This Court held in *Teamsters Local 174 v. Lucas Flour Company*, 369 U.S. 95, 103 — an action under Section 301—that “incompatible doctrines of local law must give way to principles of federal labor law.” Similarly, this Court in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, a breach of contract case, invoked Section 301(b), which applies to both Section 301 and Section 303 actions, to bar a claim of damages against certain union officers and agents as individuals. The plaintiff, invoking diversity jurisdiction, sought to circumvent this federal rule of liability by pleading a state common law cause of action against the named officers and union members. Holding that Section 301(b) preempts (i.e., establishes the sole measure of liability) state common law, this Court pointed out (370 U.S. at 249):

“This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable.”

See also: *Humphrey v. Moore*, 11 L.Ed.2d 370;

Drivers Union v. Riss & Co., 372 U.S. 517.

To allow compensatory and punitive damages, not authorized by Section 303, is certainly to evade and truncate the policy of Section 303. Indeed, if state law is to be applied in Section 303 actions, peaceful primary picketing in protest of employer unfair labor practices may be made the basis of damage awards by the simple device of adding a separate count or ground and

invoking state laws in support of a Section 303 claim.²¹ Congress itself in 1947 considered and rejected a legislative prohibition upon strikes in protest of employer unfair labor practices. H.R. 3020, as passed by the House, not only prohibited strikes in protest of unfair labor practices, but, in addition, subjected "sympathy" strikes, "illegal" boycotts, "jurisdictional" strikes and "monopolistic" strikes to National Board action and private damage actions. 1 Leg. Hist. 168-171, 204-206. In the Conference Committee, however, these restrictions were—in the main—rejected; the Senate bill, not the House bill, became the law (1-Leg. Hist. 571). The type of conduct to be made the subject of a private damage action and the measure of damages (*supra*, pp. 14-15) to be allowed were carefully considered by the Congress. Congress made its decision when it enacted Section 303.

"[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 247. Accordingly, the same need for uniformity exists in actions under Section 301 and Section 303. As this Court explained in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104:

"The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interest through a process

²¹The example is not far-fetched. Picketing of this type was held to be "coercive" and illegal in *Teamsters Local 795 v. Newell*, 181 Kan. 898, 317 P.2d 817, reversed *per curiam* 356 U.S. 341. Only the First Amendment saved the union from the brand of illegality.

of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, *California v. Zook*, 336 U.S. 725, 730, 731; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 231, we cannot but conclude that in enacting Sec. 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."

Some states permit awards of punitive damages, others do not. Some states have labor codes, others do not. Some states have "right to work" laws, others do not. If the policy of federal law is to prevail, the rules governing damage actions based upon peaceful picketing and boycotts must be uniform, federal rules. We deal here with an area "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes rather than local law." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Federal law does not authorize punitive damages. Federal law does not authorize recovery of compensatory damages for loss of the Launder account. Hence, Respondent was not entitled to recover such damages.

D. Federal labor law has preempted and occupied the field of peaceful picketing and boycotts; hence, there is no state law to which "pendent jurisdiction" can attach.

The preemption doctrine (i.e., exclusive National Board jurisdiction), of course, applies with equal force to federal as well as state court proceedings. *San Diego Building Trades v. Garmon*, 359 U.S. 236; 245; *Weber v. Anheuser-Busch*, 348 U.S. 468, 479. And as we have demonstrated, under that doctrine neither compensatory nor punitive damages can be awarded for a common law secondary boycott. *Electrical Workers Local-426 v. Baumgartners Elec. Constr. Co.*, 359 U.S. 498, reversing *per curiam* 77 S.D. 286, 91 N.W.2d 663. We also have demonstrated that the nature of the conduct involved, when considered in light of the comprehensive federal regulation of such conduct, requires the conclusion the federal law and federal law alone controls. The federal law "describes and condemns specific union conduct directed to specific objectives . . ." *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 98. "Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited" by federal law. *Ibid.* In short, there is no federal law authorizing damages for "secondary boycotts," as that term is defined by the common law. Cf. *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 118 (S.D. N.Y.).

Since federal law alone controls the field of peaceful picketing, there exists no state law to which "pendent" jurisdiction can attach. Pendent jurisdiction assumes the existence of a state ground in support of a federal

claim. *Hurn v. Oursler*, 289 U.S. 238. Here there is no state ground. Therefore, there is no pendent jurisdiction.

Furthermore, the state courts correctly held that Respondent's claim of common law secondary boycott was subject to the preemption doctrine (i.e., exclusive National Board jurisdiction) (*R. 266*). A federal court, when exercising either pendent (*Maternity Yours, Inc. v. Your Maternity Shop*, 234 F.2d 538, 540 note 1 (CA 2) or diversity (*Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 78) jurisdiction, sits as a state court with respect to state claims. Since the state courts had no jurisdiction over Respondent's common law claim, the federal courts had none.

The decisions of this Court plainly indicate that where, as here, the entrance to the state courts is barred, insofar as a given state claim is concerned, the federal courts cannot open their back door to the plaintiff and adjudicate his claim under the guise of "pendent" jurisdiction. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 328; *Angel v. Bullington*, 330 U.S. 183, 191-192; *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537-538. The *Lauf* case, for example, involved a suit in federal court for an injunction against picketing and boycott activities. Diversity jurisdiction was invoked. Holding that the federal court erred in granting an injunction, this Court said: "A Wisconsin court could not enjoin acts declared by the statute to be lawful; and the District Court has no greater power to do so." 303 U.S. at 328. In the case at bar, the Ohio courts had no authority to grant damages for a common law secondary boycott; "and the District Court has no greater power to do so."

Even if the Ohio common law were applicable—and it is not—this case is not an appropriate one for the exercise of pendent jurisdiction. *Hurn v. Oursler*, 289 U.S. 238, was misread and misapplied by the courts below. In the *Hurn* case, federal jurisdiction to protect a *copyrighted* play was invoked and sustained, both with regard to federal law and state law. “[T]he claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances,” 289 U.S. at 246. But jurisdiction was disclaimed in the *Hurn* case insofar as the complaint alleged state common law violations of an *uncopyrighted* version of the same play. “From these averments two separate and distinct causes of action resulted, one arising under a law of the United States, and the other arising under general law. * * * [T]he latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case.” 289 U.S. at 248.

Respondent’s proof of loss of the Launder account rested on a set of circumstances wholly separate and distinct from his proof of alleged Section 303 violations. Different times, places and persons were involved. In *Hurn* the claims based upon the copyrighted play rested upon virtually “identical facts”; the opposite is true in this case. The loss of the Launder account is comparable to the claim of unfair competition relating to the uncopyrighted play in *Hurn*. As such, is is “entirely outside the federal jurisdiction. . . .” 289 U.S. at 248.

Peaceful union conduct, lawful under Section 303.

but unlawful under the common law of Ohio, is involved in this case. Repeatedly, this Court has said that such conduct is not amenable to state regulation. If viewed in light of Section 303 of the Act, it is nonetheless conduct amenable to regulation only if unlawful under Section 303. The comprehensive scheme of federal law has wholly occupied the field of peaceful picketing and boycotts. State law does not exist. Since there is no state law, there can be no "pendent" jurisdiction to administer non-existent state law. The power of the federal courts can be no greater than that of the state courts. Thus, under any view of "jurisdiction" it is manifest that the courts below erred in awarding compensatory and punitive damages under the common law of Ohio.

II. Section 303 of the Act Does Not Authorize an Award of Total Actual Damages Resulting Directly from a Lawful Primary Strike Merely Because the Union Also Engaged in Other Conduct Which Was Found To Be in Violation of Section 303

The courts below held that Local 20 engaged in certain conduct which violated Section 303 of the Act. The secondary employers whose employees were allegedly induced are France (no damages), Schoen (no damages) and O'Connell (\$1,600 damages). These three customers are the *only* ones with respect to which a finding of Section 303 violation was made (R. 275-276). For purposes of argument, it is assumed that these findings are correct.²² Respondent concedes, as

²²Viewed most strongly in Respondent's favor, the evidence shows that Local 20 advised its steward employed by O'Connell of the strike against Respondent and requested him to refrain from using Respondent's trucks (R. 122). The steward had no occasion in the course of

he must, that there is "no evidence of unlawful activity in connection with [the Wilson] job" (R. 166). Yet the courts below assessed \$9,300 compensatory damages because of a loss of revenue from the Wilson job (R. 289). These damages were awarded "under the totality of effort rule" (R. 284).

A. The Wilson job was lost as a proximate result of the primary strike.

It will be recalled that Local 20's strike against Respondent commenced on August 17, 1956 (R. 180, 185) and ended in early October, 1956 (R. 185). During the strike, Local 20 picketed peacefully at Respondent's premises (R. 25-26, 45-46, 63-64, 222-224). There was no interference with ingress or egress (R. 37-38, 63-64) and no physical injury to person or property at any time during the strike (R. 37-38, 197-199, 271, 282).

There is no evidence of any Local 20 contacts with any person employed by Wilson. There is no evidence of picketing or other activity by Local 20 at the Wilson job. There is no evidence that any person connected with Wilson had any knowledge of the Union's alleged unlawful conduct at Schoen, France, or O'Con-

his employment to operate the trucks and had no authority to terminate Respondent's relation with O'Connell (R. 124). Accordingly, the steward reported his conversation to the O'Connell management (R. 122, 126). Upon learning that a strike had been called against Respondent, the O'Connell management arranged for other trucking services (R. 127). There were no strikes, picketing or threats of strikes or picketing against O'Connell (R. 129). On these facts it cannot be said that Local 20 induced its steward to refuse to perform "services," and this is expressly required by the statute. Compare: *Ferro-Co. Corp.*, 102 NLRB 1660, 1661, 1666. The O'Connell account was lost as the result of a management decision (R. 129). In such circumstances, there is no violation of the Act. *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 99.

nell. It is undisputed that Respondent himself advised Wilson of the strike and his inability to continue work for Wilson because of a lack of drivers due to the strike (R. 171, 173, 184).

Neither the opinions (R. 276-296) nor the findings (R. 269-276) below purport to make an express finding contrary to the preceding statement of facts. Some reliance (R. 274, 288), however, apparently was placed upon the testimony of one Taulbee. Taulbee, who was working for Respondent at the time of the trial, was one of the strikers during the 1956 strike (R. 194). On direct examination Taulbee testified that he didn't want to return to work because Local 20 had on occasion followed Respondent's trucks and "that would end up in me maybe getting hurt" (R. 197). There is no other similar testimony in the 683 page transcript of testimony.

The wholly frivolous character of Taulbee's testimony was revealed by the cross-examination which followed. On cross-examination, he admitted that "No one was hurt as I know of" (R. 197), that no one was "hurt on the picket line" (R. 198), that no trucks were damaged and no drivers were injured (R. 199), and that his asserted concern about "maybe getting hurt" (R. 197) was "based on a lot of talk . . . by . . . all the guys" (R. 199). Taulbee also admitted "I didn't support it [the strike] too much. I was mostly a bystander and the other guys talked it up, not me" (R. 198). This same employee attended the strike vote meeting and volunteered the information that he had "voted not to strike" (R. 198).

During the strike the lowest number of drivers actually working in any week was 20 (R. 252); and Taulbee admitted that he was aware of the fact the drivers were working during the strike (R. 198-199). In this connection he was asked (R. 199):

"Q. The fact of the matter is that anybody that wanted to go in or out of those premises did so without anybody interfering with him in any physical manner, isn't that true?

"A. Well, as far as I know it is. I never seen no trouble."

Finding of "fact" number 10 (R. 274) is based upon the Taulbee testimony discussed above. This finding of "fact" is to the effect that Local 20's following of Respondent's trucks discouraged the return to work "by an employee" of Respondent who did not want to "get followed or get hurt" (R. 274). The finding then asserts (R. 274):

"*** Accordingly, this activity made the strike of the Defendant against the Plaintiff more effective to prevent Plaintiff's employees from returning to work than it would have been but for such activity."

This finding is on its face an argument rather than a finding of fact and in light of the testimony set forth above, is unsupportable either as an argument or a fact. Even if it were conceded, and it is not, that Taulbee harbored a genuine subjective fear, his testimony amounts to nothing. There is nothing in the record to indicate that any other employee was similarly affected and there is nothing in the Act which suggests that a union may be held accountable for the irrational fears of reluctant strikers.

Moreover, in the absence of violence or threat of violence — and there was none — a claim that peaceful picketing discourages would-be strike-breakers, employed by the primary employer, from working for the primary employer is completely irrelevant. Sections 7 and 13 of the Act guarantee the right to strike. And this guarantee is obviously broad enough to encompass an effort to discourage, by peaceful means, striking employees of the primary employer from working during the strike. "Picketing which is lawful primary picketing is not turned into unlawful secondary picketing because the picketing is effective against the primary employer and its employees. . . ." *Brownfield Electric Co.*, 145 NLRB No. 113, slip. op. pp. 4-5. Indeed, the right to engage in a primary strike exists independently of the Act. *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209.

Throughout the history of the Act, as applied to labor organizations, the National Board has recognized under the roving-situs doctrine the right of a union to follow the trucks of the primary employer to the premises of a neutral employer and to picket at the premises of the neutral employer while the truck of the primary employer was unloading. *United Plant Guards of America (Houston Armored Car Company, Inc.)*, 136 NLRB 110, 111; *Schultz Refrigerated Service*, 87 NLRB 502. Inducing striking employees of the primary employer to support a strike violates no federal law. Hence the finding that Local 20 discouraged Respondent's employees from working is not only unsupportable but is also irrelevant.²³

²³The record demonstrates only that Respondent's striking employee
(Continued on Pg. 35)

In conclusion of this point, it is submitted that Respondent lost the Wilson account solely as a consequence of fact that his drivers were engaged in a peaceful, orderly strike. No other finding can be supported by the record.

B. The primary strike and picketing at Respondent's premises were affirmatively protected by the Act and by the First Amendment.

The strike was precipitated by Respondent's improper²⁴ demand that his competitors be organized before he be required to sign an agreement (R. 34-36, 40, 204, 205-207, 233, 241, 251-252, 253-260). Such strikes are affirmatively protected by Sections 7 and 13²⁵ of the

knew the trucks were being followed on occasion. Even if the followed trucks were manned by *neutral* employees, and they were not, no violation would have existed. The mere following of trucks is not an "inducement." *Santa Ana Lumber Co.*, 87 NLRB 937.

²⁴Respondent's position constituted a patent refusal to bargain in violation of Section 8(a) (5) of the Act. *Newton Chevrolet*, 37 NLRB 334, 341; *George P. Pilling & Son Co.*, 16 NLRB 650, 660-661, *aff'd* 119 F.2d 32 (CA 3); *J. Chesler & Sons, Co.*, 13 NLRB 1, 8-10; *Harbor Boat Building Co.*, 1 NLRB 349, 355.

²⁵Sec. 7 (29 USC, Sec. 157) provides:

"Employers shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)."

Sec. 13 (29 USC, Sec. 163) provides:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Act as well as by the First Amendment to the Constitution.²⁶

Only three types of primary strikes were proscribed by Section 8(b)(4) and 303 of the 1947 Act;²⁷ namely, jurisdictional strikes, strikes to compel an employer to join a Union, and strikes in derogation of another Union's certification as bargaining representative [Section 303(a)(1), (3) and (4)]. Since Respondent has not and cannot bring his case within any one of these three exceptions to the right to engage in a primary strike, it should be concluded that Local 20's strike is entitled to the protection conferred by Section 13 of the Act.

From Section 13 of the Act, as well as from the legislative history of the Act, it is clear that "Congress did not seek, by Section 8(b)(4), to interfere with the ordinary strike . . ." *International Rice Milling Co. v. NLRB*, 341 U.S. 665, 672. Accordingly, the courts have consistently interpreted Section 8(b)(4)(A) and Section 303 not literally, but in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offend-

²⁶See e.g.: *Teamsters Local 795 v. Newell*, 356 U.S. 341, reversing per curiam 181 Kan. 698, 317 P.2d 817; *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106.

²⁷Section 8(b)(4), 29 USC 158(b)(4) and Section 303, 29 USC, Sec. 187, "have an identity of language" but specify two "different remedies." *Longshoremen v. Juneau Corp.*, 342 U.S. 237, 244. Section 8(b)(4) provides that certain conduct constitutes an unfair labor practice for which an administrative remedy is afforded. The same conduct also gives rise to a claim for damages cognizable in either state or federal courts. Since the two sections "have an identity of language," cases arising under both sections are relevant to this action. As a consequence of the 1959 amendments to the Act, Sec. 303 now incorporates by reference the prohibitions embodied in Sec. 8(b)(4).

ing employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692. See also: *Teamsters Local 728 v. Empire State Express*, 293 F.2d 414 (CA 5); *Haughton v. Woodworkers*, 294 F.2d 766 (CA 9).²⁸

As more fully explained by this Court in *Electrical Workers Local 761 v. Labor Board*, 366 U.S. 667, 672:

"This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. 'While § 8(b) (4) does not expressly mention "primary" or "secondary" disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's "secondary boycott sections." ' *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 686. 'Congress did not seek, by § 8(b) (4), to interfere with the ordinary strike . . . ' *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672. The impact of the section was directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.' *International Brotherhood of Electrical Workers v. NLRB* (CA 2) 181 F.2d 34, 37. Thus the section 'left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees, but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them . . . and even employees of secondary employ-

²⁸Both the *Empire* and the *Haughton* cases arose under Section 303.

ers so long as the labor organization did not. . . . "induce or encourage the employees of any employer to engage in a strike or a concerted refusal in their course of their employment" . . . ' *NLRB v. Local 294, International Brotherhood of T.C. W.H.* (CA 2) 284 F.2d 887, 889."

The Act and the decisions construing it accord peaceful, primary strikes a protected status; and damages, therefore, cannot be predicated upon injury flowing proximately from such strikes. Damages can be recovered in a Section 303 action only for "injury" to "business or property by reason of any violation of subsection (a)" of Section 303. Primary strikes do not violate Section 303(a).

C. Lawful, primary strikes do not lose their protected status merely because the Union contemporaneously engaged in unlawful acts.

The first set of cases, involving Section 8(b)(4) of the Act, to reach this Court posed the question of the extent to which the Act proscribed picketing at a construction site, occupied by several independent contractors. *Labor Board v. Denver Building and Construction Trades Council*, 341 U.S. 675. For obvious reasons, cases of this type came to be known as "common situs" cases.

Awarding damages for the loss of the Wilson account, the courts below invoked the "totality of efforts rule" expounded in *Carpenters Local 131 v. Cisco Construction Co.*, 266 F.2d 365 (CA 9), cert. denied 361 U.S. 826. *Cisco* involved picketing in support of a dispute with a general contractor. The picketing occurred at a common situs and at the wholly separate premises

of subcontractors with whom the union had no dispute. The Ninth Circuit, in the *Cisco* opinion, said (266 F.2d at 367, 369):

"Generally, it may be said that the away-from-the-job site pressure, if it must be kept uncommingled with the job site picketing did no substantial damage. The damages which Cisco did suffer would appear to have been caused because the subcontractors' union men just would not cross the picket lines at the job sites. The trial court expressly found that the first picket line as originally established was not illegal. And we think it implicit in the court's decision, findings of fact and conclusions of law, that if there had been nothing more than picketing, without the addition of other activity directed at or through the subcontractors, then recovery might have been denied. So it appears that the primary question here is whether we may take a concept of the totality of effort, charging all damage to defendants.

* * *

"Of course, if the activities of the defendants must be strictly compartmentalized and the activities treated as wholly severable, then this court could be wrong. (Still it would always appear that the purposes of the original picket lines at a very early date acquired the secondary object as something very much in the forefront.)"

Perhaps the court in *Cisco* held only that unlawful acts can be taken into consideration in determining whether picketing at a common situs is actually directed at secondary employers. If so, the case has no application here. For in this case there is no possibility of a finding that the strike and picketing at Respondent's premises were designed to cause a work

stoppage of employees of a secondary employer. Cf. *Milwaukee Plywood Co. v. NLRB*, 285 F.2d 325, 328 (CA 7). Such a finding is impossible because there were no neutral employees or neutral employers working at Respondent's premises.

In any event, the "totality of efforts rule," as applied by the courts below, represents a wholly unwarranted extension of the exceedingly dubious *Cisco* opinion. As applied in this case, the "totality" rule has been invoked to hold Local 20 liable for injury proximately resulting from lawful acts. Such application of the "totality" rule is repugnant to the First Amendment, the language of the Act, and to common sense.²⁹ As we have demonstrated, Local 20's primary strike activities at Respondent's premises were protected by the First Amendment; and paraphrasing this Court's opinion in *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 296, such protection is not "forfeited because of disassociated acts." See also: *Youngdahl v. Rainfair*, 355 U.S. 131, 139.

Section 303(b) authorizes an award of damages only in the event of injury "by reason of any violation

²⁹Respondent conceded during the trial that there was "no evidence of unlawful activity in connection with the [Wilson] job" (R. 166). This concession prompted the district court to remark: "I think it is so remote that it requires some mental gymnastics to connect the matter up" (R. 167). Nevertheless, the district court awarded damages based upon the Wilson account.

The Wilson account damages are no less "remote" than the Seneca County damages which the district court refused to assess (R. 201, 271-272, 283-284). In both the case of Wilson (R. 171, 173) and Seneca County (R. 151), Respondent's customer learned of the strike from persons having no connection with Local 20 and upon learning of the strike arranged for substitute trucking services. Disparate treatment of the two claims is without factual or theoretical basis. Both claims should have been denied.

of subsection (a).” Primary strikes do not violate subsection (a) of Section 303 of the Act. Surely if Respondent had filed a complaint praying for damages upon the allegation that Local 20 had engaged in a primary strike, the courts would summarily dismiss the complaint. The very purpose (and sole value) of primary activities is to cause economic loss to the primary employer. If he may recoup these losses when a union also engages in other conduct which crosses the less than “glaringly bright line” (*Electrical Workers Local 761 v. Labor Board*, 366 U.S. at 673) separating permissible from prohibited conduct, then the exercise of primary activities becomes hazardous indeed. Thus to sustain an award of damages for losses resulting proximately from primary activities upon a theory of “totality” of effort is to do by indirection that which cannot be done directly. There is no legislative warrant for directly or indirectly awarding damages based upon injury resulting from primary activities.

Even if tort standards were applied, and they should not be (*Douds v. International Longshoremen’s Assoc.*, 224 F.2d 455, 459 (CA 2), *cert. denied* 350 U.S. 873), it is still the rule that damages can be awarded only where the “loss is the direct and necessary result of defendant’s wrongful conduct . . .” *Cranston Paint Works Co. v. Public Service Co. of N.C.*, 291 F.2d 638, 649 (CA 4). See also: 15 Am. Jur., “Damages,” Secs. 138 and 155. The explicit language of the Act as well as its legislative history bespeaks a clear intent to authorize the recovery of actual damages only. *Mine Workers v. Patton*, 211 F.2d 742, 749-750 (CA 4); *Overnight Transportation Co. v. International Broth-*

erhood of Teamsters, 257 N.C. 18, 125 S.E.2d 277. In short, the statute adopts the "basic principle underlying common law remedies that they shall afford only compensation for the injury suffered." *Illinois C. Ry. Co. v. Crail*, 281 U.S. 57, 63. As stated in *Guido v. Hudson Transit Lines*, 178 F.2d 740, 743 (CA 3): "Damages are support to compensate the injured person for the wrong which has been done him." Or as stated in *Central Coal & Coke v. Hartman*, 111 Fed. 96, 98 (CA 8):

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. * * * These are fundamental principles of the law of damages."

The *Cisco* case, as construed by the courts below, is at war with these elementary and fundamental principles. The National Board, on one occasion, relied upon the *Cisco* decision and adopted a "totality" theory of the type contended for by Respondent. *McJunkin Corporation*, 128 NLRB 522, 525.

With respect to the NLRB's decision in *McJunkin*, the United States Court of Appeals for the Seventh Circuit, in *Milwaukee Plywood Co. v. NLRB*, 285 F.2d 325, 329 (CA 7), commented:

"At the oral argument, counsel for petitioner invited attention to and relied upon a decision of the Board which was handed down August 9, 1960. *McJunkin Corporation*, 128 NLRB No. 57. This is a 3 to 2 decision by the Board. *Some kind of a theory of 'totality of efforts' is there suggested whereby three incidents, by themselves lawful, become unlawful by an incident at another location.*" (Emphasis added)

More significantly, however, the National Board's decision in *McJunkin* was appealed to the United States Court of Appeals for the District of Columbia. The Court reversed the National Board's decision in a *per curiam* opinion. *Chauffeurs Local 175 v. NLRB (McJunkin Corp.)*, 294 F.2d 261 (CA DC). The Court stated in full, as follows:

"In aid of a strike against McJunkin Corporation in Charleston, West Virginia, the union (1) picketed its plant, (2) told employees of neutral trucking concerns, over the telephone, that the plant was being picketed, expressly or impliedly asking them to respect the picket line, and (3) at the premises of one neutral concern, Miami Transportation Company, induced its employees not to unload a McJunkin truck for transportation. This last was a clear violation of Section 8(b)(4) of the National Labor Relations Act as amended, 29 U.S.C., Sec. 158(b)(4)(A), but there was no evidence that any other action of the union had any illegal purpose or effect. The Board's order is apparently intended to prevent the union from inducing employees of any trucking concern to respect the picket line at McJunkin's plant. *But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the Union has acted illegally elsewhere.* The case will be remanded to the Board with directions to modify its order so that it will not be broader than the one the hearing examiner had recommended." (Emphasis added)

The National Board has made no effort to revive the discredited "totality" rule.

The record evidence compels the conclusion that Re-

spondent lost the Wilson account solely as a result of the primary strike. It is equally clear that the primary strike was affirmatively protected by the First Amendment to the Federal Constitution and by Sections 7 and 13 of the Act. Common sense, the preponderance of authority, and the express language of the Act compel the conclusion that financial loss, proximately resulting from lawful acts, cannot be recovered in an action under Section 303 of the Act. The award of damages based upon the loss of the Wilson account therefore should be reversed.

CONCLUSION

Peaceful picketing and boycott activities lawful under federal law were, in this case, the predicate of a substantial damage award. The activities were of the type repeatedly held to be subject to the exclusive jurisdiction of the National Board. It is true that state and federal courts have authority to assess compensatory damages for conduct which is in terms prohibited by Section 303. But having exercised such jurisdiction the court has exhausted its power. Federal law establishes the rule of liability and the measure of damages. There is no state law to which "pendent" jurisdiction can attach.

Section 303 authorizes an award of compensatory damages for injury proximately caused by conduct which violates Section 303. There is no statutory warrant for an award of damages for injury proximately caused by lawful, primary activities. Indeed, to award damages for such losses is to make a mockery of Sections 7 and 13 of the Act which guarantee the right to strike.

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Section 303 of the Labor Management Relations Act of 1947 provided:

“(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce ~~or encourage~~ the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 485.

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION,

an Affiliate of the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,

Petitioner,

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 485.

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION,**

**an Affiliate of the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,**

Petitioner,

vs.

**LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY,**

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT.**

RESPONDENT'S BRIEF.

OPINIONS BELOW.

The opinion of District Court (R. 276-290) is reported 200 F. Supp. 653. The opinion of the Court below (R. 291-296) is reported in 320 F. 2d 505.

JURISDICTION.

The judgment of the Court below was entered on July 25, 1963. The petition for writ of certiorari was filed on September 20, 1963 and was granted on December 9, 1963. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Teamsters Union's secondary strike activity violated Section 303, LMRA, and whether the courts below correctly awarded damages thereunder.

2. Whether the Teamsters Union's secondary strike activity also violated Ohio's common law and if so, whether the courts below correctly awarded punitive and compensatory damages thereunder, in addition to the O'Connell and Wilson damages that are supported by the state common law and Section 303, LMRA.

3. Whether the Federal District Court had pendent jurisdiction to award compensatory and punitive damages under the Ohio common law.

STATUTE INVOLVED.

The statutory provision involved is Section 303 of the Labor-Management Relations Act of 1947, 61 Stat. 158, 29 USC, Section 187 (referred to as "LMRA"). It is printed in Appendix A, *infra*, pp. 56-57. Although certain amendments to Section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 USC, Sec. 187, such amendments are not germane to the questions presented in this case.

STATEMENT.

The Respondent, Lester Morton, d/b/a Morton Trucking Company (referred to as "Respondent"), is engaged in the general dump truck business in Tiffin, Ohio operating approximately 50 dump trucks as a subcontractor on highway construction (R. 269). For some years the Respondent's employees had been members of the Petitioner, Teamsters Local 20 (referred to as "Teamsters Union"), under an oral agreement, but on August 17, 1956 the Teamsters Union struck in support of its demands for a written contract and wage increases (R. 269-70).¹

The Teamsters Union did not engage in any actual physical violence during the strike, which ended October 5, 1956 (R. 270-1) but this case does involve threats to the public order and intimidation (R. 56-8, 82-4).

On August 21, 1956 the Common Pleas Court of Seneca County, Ohio restrained the Teamsters Union from, inter alia, engaging in secondary boycott activity, from intimidating Respondent's employees and from following Respondent's employees on the public highways or elsewhere (R. 270-1). The Teamsters Union, however, engaged in unlawful secondary boycott activity, in defiance of the restraining order (R. 289).

¹ On page 3 of its brief the Teamsters Union states as a fact that "Respondent's demand that any written agreement be conditioned upon (the Teamsters Union's) securing similar written agreements covering Respondent's competitors" caused an impasse which "precipitated" the strike. This is untrue. The District Court did not so find. As a matter of fact, the Teamsters Union represented to Respondent, prior to the strike, that it already had contracts with most of Respondent's competitors and Respondent merely asked that the Teamsters Union substantiate its representation (R. 239). The strike was the result of the Teamsters Union's demand that Respondent agree to a contract at the first negotiating session between the parties (R. 251). The Teamsters Union made good on its threat to strike the following morning if its demands were not met immediately (R. 270).

The Teamsters Union maliciously engaged in secondary activity unlawful under Section 303, LMRA and the common law of Ohio (R. 275-6). This unlawful activity made the strike effective to intimidate Respondent's employees, customers and suppliers, severely damaging Respondent's business as hereinafter set forth.²

The District Court concluded that the material and operative facts supporting Respondent's federal claim of secondary activity unlawful under Section 303, LMRA, were substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity and that there are not involved two causes of action, but simply different grounds to support the same cause of action, the cause of action being the Teamsters Union's violation of Respondent's right to be free from unlawful interference with his business (R. 275). The District Court also concluded that it had jurisdiction to award compensatory and punitive damages under the common law in addition to having jurisdiction to award compensatory damages under Section 303, LMRA (R. 275). The District Court also found that the Teamsters Union had engaged in both lawful and unlawful strike activity and concluded that therefore the totality of the Teamsters Union's efforts should be considered in assessing damages based upon all loss suffered as a result of the strike (R.

² "The records of the National Labor Relations Board show that from the enactment of Taft-Hartley in 1947 until the present, 34 percent of the secondary boycott cases coming to the Board involve the Teamsters Union which represents about 10 percent of all of the members of organized labor. Thus, the figures demonstrate, that like minority picketing, the secondary boycott is a favorite device of the Teamsters, and is used by them at least three and one-half times as frequently as it is by any of the rest of the labor movement." Minority Views, Senate Report No. 187, April 14, 1959 regarding Labor-Management Disclosure Act of 1959, U. S. Code Congressional and Administrative News, 1959, part 2, pages 2318, 2382.

276). The Court of Appeals affirmed these findings and conclusions (R. 295).

The District Court found that the Respondent suffered net specific damages in the total amount of \$19,619.62 (R. 274, F. F. 12³) and awarded compensatory damages in that amount together with punitive damages in the amount of \$15,000.00 as a consequence of the fact that the Teamsters Union's conduct was pursued maliciously and in wanton disregard of the legal rights of the Respondent (R. 275, F. F. 13). The Court of Appeals affirmed.

The District Court concluded that the Teamsters Union violated Section 303, LMRA, by conduct affecting Respondent and one of his suppliers (France) and two of his customers (Schoen and O'Connel) (R. 275-6, C. L. 5) and awarded \$1,600.00⁴ in damages as the result of the Section 303, LMRA violation with respect to Respondent's customer, O'Connel (R. 249, 275-6, C. L. 5). The District Court also found that as a result of a combination of the Teamsters Union's activity that was in part lawful (i.e., its primary picketing at Respondent's garage) and in part unlawful under Section 303, LMRA and the state common law, Respondent had an insufficient number of truck drivers during the strike to perform fully his contract with his customer Wilson (R. 274, F. F. 11). Because it was impossible to determine how many truck driver employees of the Respondent failed to work during the strike because of (1) simply the lawful primary picket line, on the one hand, and (2), the secondary activity of the Teamsters Union violative of Section 303, LMRA and the state common law, on the other, the District Court concluded that the totality of the Teamsters Union's strike activity should be considered and awarded Respondent the total damages

³ F. F.: Finding of Fact, C. L.: Conclusion of Law.

⁴ References to damages will be made in round numbers.

(\$9,300.00) he suffered as the consequence of the strike causing him to lose the Wilson job (R. 249, 276, C. L. 6).

The District Court also concluded that the Teamsters Union violated the Ohio common law against secondary strike activity by the conduct violative of Section 303, LMRA and, additionally, by conduct affecting Respondent and another customer (Lauder) (R. 275-6, C. L. 5). The District Court awarded \$8,700.00 in damages as the result of the Teamsters Union's common law tort with respect to Respondent's customer Lauder (R. 249, 275-6, C. L. 5).

The District Court also found that the Teamsters Union's secondary strike activity violative of the state common law was undertaken maliciously and with wanton disregard of the rights of the Respondent and of others and awarded Respondent \$15,000.00 in punitive damages under the state common law (R. 275, F. F. 13 and 14).

The Court of Appeals affirmed (R. 295-6) the foregoing holdings of the District Court, the facts supporting which will be briefly described in the following paragraphs.

A. SECTION 303 VIOLATIONS.

1. France Stone Company.

One of Respondent's suppliers was The France Stone Company. In violation of the restraining order and in violation of Section 303, LMRA (and the state's common law), the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged France's employees to engage in a concerted refusal to load Respondent's trucks for the purpose of forcing France to cease doing business with the Respondent (R. 46-52, 73, 97-8, 104, 272 F. F. 6, 275, F. F. 13, C. L. 5, R. 284).

2. O'Connel Coal Co.

Another of Respondent's customers was the O'Connel Coal Co. In violation of Section 303, LMRA (and the state's common law), the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged O'Connel's employees to force O'Connel (and encouraged the management of O'Connel direct), to cease doing business with the Respondent (R. 121, 122, 126, 127, 272-3, F. F. 7, R. 275, F. F. 13, C. L. 5, R. 284-5). Consequently, O'Connel ceased doing business with the Respondent during the strike (R. 127, 273, F. F. 7(d)) and Respondent suffered \$1,600.00 in damages (R. 249, 274, F. F. 12).

3. C. A. Schoen, Inc.

Another of Respondent's customers was C. A. Schoen, Inc. In violation of the restraining order and in violation of Section 303, LMRA (and the state common law), the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged Schoen's employees to force Schoen (and encouraged the management of Schoen direct), to cease doing business with the Respondent (R. 56-60, 81-86, 133-145, 273-4, F. F. 10, R. 275-6, F. F. 13, C. L. 5, R. 285). Consequently, Schoen ceased doing business with the Respondent during the strike (R. 145, 274, F. F. 9(d)).

B. COMMON LAW VIOLATIONS.

1. Launder & Son, Inc.

Another of Respondent's customers was Launder & Son, Inc. In violation of the restraining order and in violation of the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged and requested Launder to cease

doing business with the Respondent (R. 52-5, 86-90, 110-1, 273, F. F. 8, R. 275-6, F. F. 13, C. L. 5, R. 285, 287). Consequently, Launder ceased doing business with the Respondent during the strike (R. 161-2, 273, F. F. 8(c)) and Respondent suffered \$8,700.00 in damages (R. 249, 274, F. F. 12).

C. DAMAGES FROM LOSS OF WILSON JOB.

Another of Respondent's customers was the Wilson Sand & Gravel Co. As a result of a combination of the Teamsters Union's primary picket line and its unlawful secondary activity violative of Section 303, LMRA and the state common law, Respondent had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson and consequently, Respondent suffered damages in the amount of \$9,300.00 (R. 169-70, 183-4, 249, 274, F. F. 11, R. 276, C. L. 6).

SUMMARY OF ARGUMENT.

During the seven week strike against the Respondent, the Teamsters Union, which represented his employees, engaged in secondary activity against two of Respondent's customers and one of his suppliers. This activity violated Section 303, LMRA and accordingly Respondent is entitled to recover damages under that section. Respondent suffered \$1600.00 in damages as a result of the Teamsters Union's secondary activity against one of these customers (Schoen). The Respondent suffered additional damages as the result of not having enough drivers report to work during the strike to complete a contract with his customer Wilson. There is no evidence that any of Respondent's employees failed to work simply as the result of the Teamsters Union's lawful, primary picket line and there is uncontradicted evidence that some employees

failed to work as the result of the Teamsters Union's unlawful secondary activity. The courts below found (R. 274, F. F. 11(b)) that the Respondent lost the Wilson profit as a result of a combination of the Teamsters Union's lawful and unlawful strike activity and properly awarded judgment against the Teamsters Union for the Wilson damages as well as the O'Connel damages. The Teamsters Union cannot be heard to complain that it is impossible to determine how many truck drivers stayed away because of its unlawful secondary activity and how many stayed away simply because of its primary picket line. *Story Parchment Co. vs. Paterson Parchment Paper Co.*, 282 U. S. 555, 562-3.

The identical acts that constituted the Teamsters Union's secondary strike activity violative of Section 303, LMRA also violated Ohio's common law against secondary strike activity (R. 275, C. L. 5). The Ohio common law also outlaws a striking union appealing to the management of the struck employer's customers and suppliers for the purpose of urging such customers and suppliers to cease doing business with the struck employer. Thus, the Ohio common law (R. 275, C. L. 5) supports the lower courts' award of \$8,700.00 for Respondent's loss of the Launder job (which was lost as a result of the Teamsters Union's approaching the management of Launder and asking it to cease doing business with Respondent during the strike) as well as the \$1,600.00 O'Connel award and the \$9,300.00 Wilson award which are supported by both Section 303, LMRA and the state common law.

The state common law also provides for punitive damages where, as here, the Teamsters Union's unlawful strike activity involved malice and wanton disregard of

³ Cf. Sec. 303 LMRA which proscribed only the inducement and encouragement of employees.

Respondent's legal rights. The District Court accordingly properly awarded Respondent \$15,000.00 in punitive damages.

The Teamsters Union has challenged the jurisdiction of the lower courts to apply Ohio's common law to the facts of this case. Since, however, this case involved but one cause of action (R. 275, C. L. 3) and since the identical acts of the Teamsters Union which constituted the violation of Section 303, LMRA also constituted violations of the Ohio common law, the lower courts had pendent jurisdiction to apply the common law to the Respondent's entire cause of action. *Hurn vs. Oursler*, 289 U. S. 238, 246.

The Court's decision in *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236, does not require a different result. And, in any event, even under the *Garmon* rationale, the courts below were correct in awarding all of the damages awarded because, under *Garmon*, state common law can be applied in this case since it involved imminent threats to the public order.

Finally, *Garmon* is inapplicable for the further reason that the activity for which damages have been awarded under the state common law herein was neither arguably protected nor arguably prohibited by the Labor-Management Relations Act of 1947.

ARGUMENT.

I. THE TEAMSTERS UNION'S SECONDARY STRIKE ACTIVITY VIOLATED SECTION 303, LMRA AND THE COURTS BELOW CORRECTLY AWARDED DAMAGES THEREUNDER.

Section 303, LMRA⁶ at all times here relevant, provided in part:

"(a) It shall be unlawful * * * for any labor organization * * * to induce or encourage the employees of any employer to engage in * * * a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring * * * any employer * * * to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor * * * and shall recover the damages by him sustained and the cost of suit."

As summarized in the preceding statement, the District Court held that the Teamsters Union violated Section 303, LMRA (R. 275-6, C. L. 5) by conduct affecting two of Respondent's customers and one of his suppliers and the Court of Appeals affirmed (R. 295). The District Court awarded and the Court of Appeals affirmed (a) \$1600.00 in damages as resulting from the Teamsters Union's causing Respondent to lose the O'Connel work, by conduct violative of Section 303, LMRA, and (b) \$9300.00

⁶ Section 303, LMRA as it read before its amendment in 1959, is set out in full in Appendix A to this brief.

in damages resulting from the Respondent's losing the Wilson job because of not having the necessary truck driver employees available to do the work as the result of the Teamsters Union's conduct, some of which was violative of Section 303, LMRA and some of which was violative of Section 303, LMRA and the state common law.

A. The O'Connel Damages.

The day after the strike began (R. 28) Teamsters Union business agent Mowery (R. 16) went to the premises of one of Respondent's customers (O'Connel), all of whose employees just happened to be members of the Teamsters Union (R. 29), where he made a point of informing the employees of such customer (by speaking to the particular employee who just happened to be the Teamsters Union's steward⁷ for such customer's employees (R. 126, 131)) that the Teamsters Union did not want such employer to use (i.e., unload sand from) the Respondent's trucks until the strike was settled (R. 122). The O'Connel union steward promptly related this to the O'Connel management (R. 126, 136) which promptly ceased using Respondent's trucks for the duration of the strike because it did not want to risk being picketed by the Teamsters Union or having its employees go out on strike (R. 127, 129). Respondent suffered \$1600.00 in damages as the direct result of this conduct of the Teamsters Union which was proscribed by Section 303, LMRA (R. 249, 273, F. F. 8(d)).

Despite the Teamsters Union's footnote suggestion

⁷ "The fact that only a single employee was contacted would not prevent the existence of the requisite inducement of the employees as this employee was the union steward who could reasonably have been expected to transmit union instructions to his fellow employees. *NLRB vs. Local 11, Carpenters' Union*, CA-6, 1957, 242 F. (2) 932." *Wells vs. Int. Union Op. Engineers, Local 181*, CA-6, 303 F. (2) 73, 74.

(brief, pp. 30-1, footnote 22), the Teamsters Union does concede (brief, p. 30) "(f)or the purposes of argument" that the courts below were correct in holding that the Teamsters Union violated Section 303, LMRA with respect to conduct in connection with two customers (Schoen and O'Connel) and one supplier (France).

The Teamsters Union also concedes (brief, p. 30) that the lower courts were correct in assessing damages against it for Respondent's damages resulting directly from such Section 303, LMRA violations (i.e., the \$1600.00 damages suffered as a result of losing the O'Connel work (R. 249)), but contests the correctness of the lower courts' holding awarding \$9,300.00 in damages (i.e., the damages suffered as a result of losing the Wilson job) because of the Teamsters Union's secondary activity violative of Section 303, LMRA and the state common law. This point will now be discussed in detail.

B. The Wilson Damages.

The damage the Respondent suffered as a result of losing the Wilson job was occasioned by the Respondent's not having enough drivers report for work during the strike. This lack of drivers was the result of the strike having been made effective by secondary activity violative of Section 303, LMRA and the state common law.

Respondent's argument here is addressed to the Teamsters Union's argument under its Argument II. The Teamsters Union's entire argument presupposes that the Wilson job was lost "solely as a consequence of * * * a peaceful, orderly strike" (Teamsters Union's brief, page 35). As the lower courts held, however, the Wilson job was not lost solely as a consequence of a peaceful, orderly strike, but rather "as a result of the combination of (the Teamsters Union's) lawful and unlawful strike activity" (R. 274, F.

F. 11(b)), and accordingly, the Teamsters Union's argument must fail.

At the time of the strike, Wilson Sand & Gravel Co. of Upper Sandusky, Ohio was supplying sand to the V. N. Holderman Co. for its job of constructing a bypass of U. S. Route 20 around Findlay, Ohio (R. 274, F. F. 11). The Respondent had an agreement with Wilson to do the hauling of the sand being furnished by Wilson to Holderman (R. 274, F. F. 11). As a consequence of the Teamsters Union's unlawful secondary activity, the Respondent had an insufficient number of truck driver employees during the strike to perform the Wilson job (R. 274, F. F. 11). As a result of the unlawful secondary activity of the Teamsters Union at the France Stone Company premises, the Schoen Asphalt Paving premises and the Launder & Son construction site, Respondent's employees who were on strike knew that if they crossed the picket line at the Respondent's garage and went to work there, they would stand a good chance of being followed by the Teamsters Union's agents and of being encountered by the Teamster Union's agents and pickets wherever they might go for supplies or to deliver material. "This activity made the strike of the (Teamsters Union) against the (Respondent) more effective to prevent (Respondent's) employees from returning to work than it would have been but for such activity" (R. 274, F. F. 10). For example, Witness Ransom 'Taulbee, one of Respondent's employees who did not work during the strike, testified (R. 196-7) that at the time of the strike, he knew that some of his fellow employees who did go to work were followed away from the primary picket line by the Teamsters Union's business agent Evans and others. Asked what effect this sort of thing had on his deciding not to work during the strike, Taulbee testified (R. 197) over the strenuous objection of the Teamsters Union,

that he didn't want to go to work and be followed, because he was afraid of getting hurt. For every person such as Taulbee who had the courage to admit, in open court, before the officers of his union and his fellow employees, that he was afraid of getting hurt, there were undoubtedly a dozen or more others who were equally or more afraid but who would not have had the courage to admit it. We are confident the Court will fully understand the profound difference between (1) a situation where the union merely pickets the employer's factory where those who cross the picket line to go to work do so with relative personal safety because of the fact that he works within sight of many people who would witness any violence directed towards him and (2) a situation, such as the one in the instant case, where an employee who went to work and drove a truck through the picket line stood a good chance of being followed down a lonely road to a rural gravel pit by automobiles loaded with striking union men, just as some of the Respondent's loyal employees were followed to the gravel pit at Maple Grove, Ohio (R. 56-60).

Thus the Respondent has introduced credible testimony to the effect that lack of drivers was caused by the Teamsters Union's unlawful activity in following Respondent's drivers who did work during the strike, and in unlawfully picketing at secondary sites. *The Teamsters Union introduced no testimony whatever to the contrary.* The Teamsters Union did not have a single one of its members who struck against the Respondent testify that he stayed away from work simply because of the picket line at Respondent's garage. In view of the uncontradicted testimony supporting the Respondent's position, the courts below were clearly correct in assessing and affirming damages with respect to Respondent's loss of the Wilson job.

The Teamsters Union asks this Court, as it unsuccessful-

fully asked the courts below, to naively accept its tongue-in-cheek argument that the Respondent had an insufficient number of drivers to perform the Wilson job as a proximate result of the primary strike. It should be sufficient to observe that the picket line at Respondent's garage was obviously not effective to prevent Respondent's truck drivers from going to work since the Teamsters Union found it necessary to (1) follow and thereby coerce Respondent's drivers who did go to work (R. 196-7, 274, F. F. 10), (2) picket at Respondent's customers' and suppliers' premises (R. 26-52, 59, 85-6, 284), (3) induce and encourage the employees of Respondent's customers and suppliers to engage in a concerted refusal in the course of their employment to load and unload Respondent's trucks, for the purpose of forcing or requiring such customers and suppliers to cease doing business with the Respondent (R. 121, 122, 126, 127, 272-3, F. F. 7, R. 284-5), and (4) urge Respondent's customers and suppliers to cease doing business with the Respondent for the duration of the strike, all in an effort to make the strike effective. The strike was made effective by these described activities, some of which were violative of Section 303, LMRA, some of which were violative of the state common law and some of which were violative of both.

The most that can possibly be correctly said for the Teamsters Union's position is that it is uncertain as to how many of Respondent's truck drivers failed to report to work during the strike because of (1) the Teamsters Union's secondary activity violative of Section 303, LMRA, (2) the Teamsters Union's secondary activity violative of the state common law, or (3) only because of the picket line at Respondent's garage. *The Teamsters Union introduced no testimony of any driver-employees, if there were any, who stayed away ONLY because of the picket line at Re-*

spondent's garage. The District Court found as a fact that the Wilson job was lost as a result of a combination of the Teamsters Union's lawful and unlawful strike activity (R. 274).

If there is any uncertainty about the Wilson element of damages, i.e., the number of Respondent's drivers who failed to report to work for duty on the Wilson job because of (1) the Teamsters Union's unlawful secondary activity on the one hand and (2) the Teamsters Union's picket line at Respondent's garage on the other, then not the Respondent but the wrongdoer, the Teamsters Union, should suffer the consequences of the uncertainty being resolved against it.

In *Story Parchment Co. vs. Paterson Parchment Paper Company*, 282 U. S. 555, 562-3, this Court held: •

“* * * Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amends for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.”

The principle that a wrongdoer will not be permitted to complain that damages cannot be measured with exactness, where he is responsible for the confusion as to the amount thereof, has been applied by this Court in a variety of situations. In *Bigelow vs. RKO Radio Pictures*, 327

U. S. 251, the defendants in that antitrust damage action argued that it was impossible to establish any measure of damages, because the unlawful system which they created precluded the petitioners from proving what profits were lost solely as the proximate cause of the defendant's acts. There this Court said (327 U. S. at 265): "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," citing *Package Closure Corp. vs. Sealright Co.*, 2 Cir., 141 F. 2d 972, 979, and *Armory vs. Delamirie*, 1 Strange 505.

This Court observed in the *Bigelow* case that the principle here discussed is not restricted to proof of damage in antitrust suits and that in cases of collisions where the offending vessel has violated regulations prescribed by statute and in cases of confusion of goods, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. *The Pennsylvania*, 19 Wall 125, 136, 22 L. Ed. 148; *Great Southern Gas and Oil Co. vs. Logan Natural Gas & Fuel Co.*, 6 Cir., 155 F. 114, 115.

In *Bigelow* this Court further observed that in cases where the wrongdoer has incorporated the subject of plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and defendant have contributed to the profits. *Westinghouse Electric & Mfg. Co. vs. Wagner Electric &*

Mfg. Co., 225 U. S. 604; *Hamilton-Brown Shoe Co. vs. Wolf Brothers & Co.*, 240 U. S. 251.

Accordingly, in the instant case, where the Teamsters Union is the wrongdoer, it cannot be permitted to complain that it is impossible to determine how many truck driver employees of the Respondent failed to report for work during the strike because of (1) its unlawful secondary activity violative of Section 303, LMRA, or the state common law, or both, on the one hand and (2) its primary picket line, at Respondent's garage terminal, on the other. Respondent is entitled to recover the full amount of his profits (\$9300) which he lost as a result of not having enough truck drivers available during the strike to perform the Wilson job. *Westinghouse Electric & Mfg. Co. vs. Wagner Electric & Mfg. Co.*, 225 U. S. 604; *Hamilton-Brown Shoe Co. vs. Wolf Brothers & Co.*, 240 U. S. 251.

The District Court in the instant case properly relied upon *Carpenters Union vs. Cisco Construction Co.*,⁸ 9 Cir., 266 F. 2d 365, cert. den. 361 U. S. 826, where the following is found at page 367:

"Generally, it may be said that the away-from-the-job-site pressure, if it must be uncommingled with the job site picketing, did no substantial damage. The damage which Cisco did suffer would appear to have been caused because the subcontractors' union men just would not cross the picket lines at the job sites. The trial court expressly found that the first picket line as

⁸ The application of the totality of effort rule in this case is consistent not only with the *Cisco* case but also with *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862. In its petition for certiorari in that action (Case No. 292, October, 1962 term) the union pointed out that in the lower courts the employer had relied upon the *Cisco* case "to support the totaling of damages" and that such courts had totalled and awarded damages for legal and illegal picketing.

originally established was not illegal. And we think it implicit in the Court's decision, findings of fact and conclusions of law, that if there had been nothing more than picketing, without the addition of other activity directed at or through the subcontractors, then recovery might have been denied. So it appears that the primary question here is whether we may take a concept of the totality of effort, charging all damage to the defendants."

The Court of Appeals in the Cisco case stated the question in a slightly different manner on page 370:

"So the test is not merely: Is there a picket line? But: What is the object and what is whole situation?"

The same Court of Appeals stated its conclusion on the same page:

"* * * The totality of the effort may be considered and shows that when one of the real objects becomes to reach the contractor through an innocent third party (by concerted action, of course), then he who has suffered may recover."

In the Cisco case and in the instant case, the lower courts have done no more than to properly apply the principles established by this Court in the *Story Parchment* and similar cases.

The Teamsters Union must, of course, attempt to avoid the obvious effect upon it of the application of the rationale of *Story Parchment* and related cases and of the "totality of the effort" rule which the Ninth Circuit Court of Appeals in the Cisco case found to be based upon four United States Supreme Court cases.⁹ The Teamsters Union

⁹ *NLRB vs. International Rice Milling Co., Inc.*, 341 U. S. 665, 71 S. Ct. 961; *NLRB vs. Denver Building and Construction Trades Council*, 341 U. S. 675, 71 S. Ct. 943; *International Brotherhood of Electrical Workers vs. NLRB*, 341 U. S. 694, 71 S. Ct. 954; *Local 74, United Brotherhood of Carpenters vs. NLRB*, 341 U. S. 707, 71 S. Ct. 966.

has attempted to avoid application of the "totality of effort" rule by citing two cases that have little or nothing to do with the precise question which the Cisco case decided. The Teamsters Union refers (Br. pp. 42-3), first, to a non-damage NLRB unfair labor practice case, *Local Union No. 175, Teamsters vs. NLRB*, U. S. Court of Appeals, District of Columbia, 294 F. 2d 261, where the entire per curiam decision is as follows:

"In aid of a strike against McJunkin Corporation in Charleston, West Virginia, the union (1) picketed its plant, (2) told employees of neutral trucking concerns over the telephone, that the plant was picketed, expressly or impliedly asking them to respect the picket line, and (3) at the premises of one neutral concern, Miami Transportation Company, induced its employees not to unload a McJunkin truck for transshipment. This last was a clear violation of Section 8(b) (4) (A) of the National Labor Relations Act as amended, 29 U. S. C. A. Section 158(b) (4) (A), but there was no evidence that any other action of the union had any illegal purpose or effect. The Board's order is apparently intended to prevent the union from inducing employees of any trucking concern to respect the picket line at McJunkin's plant. *But peaceful primary picketing and its normal incidents, including request to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere.* The case will be remanded to the Board with directions to modify its order so that it will not be broader than the one the Hearing Examiner has recommended. As so modified, the order will be enforced." (Emphasis added.)

It is immediately clear that this case presented to the Court of Appeals the *sole question of whether lawful strike activity can be enjoined where the offending union is also engaged in unlawful secondary activity.* If the case before

this Court presented the question of whether the primary picketing at the Respondent's garage and office premises could be enjoined because the Teamsters Union had engaged in unlawful secondary activity at the France Stone Company and elsewhere, the *Local Union No. 175* case would be relevant. We certainly agree that the *Local Union No. 175* case is correct. We have always thought so. This is indicated by the fact that the Respondent did not ask the Court of Common Pleas of Seneca County, Ohio, or the NLRB to enjoin peaceful primary picketing at Respondent's garage and office premises during the strike, but only asked the Common Pleas Court to enjoin the unlawful secondary activity and mass picketing. Accordingly, the *Local Union No. 175* case has no application at all to the instant case. The courts below correctly held that in this *damage* action, the Court should apply the "totality of the effort" rule.

If the primary picketing at Respondent's garage and office premises did result in some of Respondent's drivers not reporting to work for duty on the Wilson job, the fact is that the Teamsters Union made no attempt to prove how many of Respondent's truck drivers stayed away from work merely because of the Teamsters Union's lawful activities and the District Court found that Respondent lost the Wilson job because of having an insufficient number of truck drivers as a result of the Teamsters Union's lawful and unlawful strike activity (R. 274, F. F. 11(b)). The District Court thus found as a fact that the Wilson job was lost because of a combination of the Teamsters Union's (1) lawful activity and (2) unlawful activity which consisted of (a) picketing and other forms of inducements of the Respondent's customers' and suppliers' employees for purposes violative of Section 303, LMRA and (b) inducements of Respondent's customers and suppliers

direct, to cease doing business with the Respondent, in violation of the state common law (R. 275, F. F. 5). On principle and authority¹⁰ Respondent should be awarded the Wilson damages under Section 303, LMRA. This is so, regardless of whether this Court determines that the courts below were correct in applying the state's common law, which also supports the same damage award.¹¹

II. THE TEAMSTERS UNION'S SECONDARY STRIKE ACTIVITY ALSO VIOLATED OHIO'S COMMON LAW AND BASED THEREON THE COURTS BELOW CORRECTLY AWARDED PUNITIVE (\$15,000.00) AND COMPENSATORY (\$8,700) DAMAGES IN ADDITION TO THE O'CONNEL (\$1,600.00) AND WILSON (\$9,300.00) DAMAGES THAT ARE SUPPORTED BY THE STATE COMMON LAW AND SECTION 303, LMRA.

At this point we shall briefly demonstrate that the Teamsters Union's secondary strike activity violated Ohio's common law and that, assuming for the moment that the courts below were correct in holding that Ohio's common law can be applied to the facts in this case, such courts correctly awarded punitive damages and compensatory damages under such common law. In the next part of our brief, we shall consider the Teamsters Union's argument that the lower courts erred in applying Ohio's common

¹⁰ *Story Parchment Co. vs. Paterson Parchment Paper Co.*, 282 U. S. 565; *Bigelow vs. RKO Radio Pictures*, 327 U. S. 251; and *Carpenters Union vs. Cisco Construction Co.*, 266 F. (2) 365, cert. den. 361 U. S. 826.

¹¹ 33 Ohio Jurisprudence (2) Section 64, Secondary Boycott, pages 187-8; *Moore & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547 (1947); *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541, 104 N. E. (2) 22; *Temple McAllister vs. Trumbull County Bldg. Trades Council*, 12 O. O. 179; and *Bell vs. Rogers*, 107 N. E. (2) 136.

law to such facts because of the Teamsters Union's pre-emption argument.

The common law of Ohio is that appeals by a striking union to the struck employer's customers and suppliers, urging cessation of business by those customers and suppliers with the struck employer, are unlawful and this is so whether or not the striking union appeals to such customers' or suppliers' employees; and damages may be awarded the struck employer for the losses suffered. 33 *Ohio Jurisprudence* (2) Section 64, Secondary Boycott, pages 187-8; *Moore & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547; and *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541. Further, the common law of Ohio is to the effect that punitive damages may be awarded in tort actions which involve malice or the wanton disregard of the legal rights of others; 16 *Ohio Jurisprudence* (2): Damages, Section 145, Tort Actions Generally, page 281; *Smithhisler vs. Dutter*, 157 O. S. 454, 105 N. E. (2) 868 (1952).

As the lower courts held (R. 275-6, C. L. 5 and 6; R. 295), the compensatory damages awarded the Respondent for the Teamsters Union's violations of Section 303, LMRA (i.e., lost profit from O'Connell, \$1,600.00; and lost profit from Wilson, \$9,300.00) are supported by the state common law as well as by Section 303, LMRA. As further held by the lower courts (R. 275-6, C. L. 5 and 6; R. 295), the state common law also requires that compensatory damages be awarded Respondent for his loss of the Launder profit (\$8,700.00). As the Teamsters Union concedes (brief, p. 12), such profit was lost as the result (R.

273) of the Teamsters Union successfully asking the management of Launder direct (no Launder employees were induced or encouraged) to cease doing business with the Respondent during the strike. This secondary activity violated the state common law, though it did not violate Section 303, LMRA.

The Teamsters Union does not dispute (brief, p. 13) that the Ohio common law, if its applicability has not been preempted by the LMRA, authorized the lower courts to award (R. 275, F. F. 14) and affirm (R. 295) punitive damages in the amount of \$15,000.00. The punitive damages were awarded because of the intentional malice and wanton disregard of Respondent's legal rights that were found by the lower courts to have accompanied the Teamsters Union's unlawful secondary strike activity (R. 275, F. F. 13).

Since the state common law, if its applicability has not been preempted by the LMRA, justifies and supports all of the compensatory damages (part of which (O'Connel, \$1,600.00 and Wilson, \$9,300.00) are supported independently by Section 303, LMRA) and punitive damages awarded to the Respondent herein, we now come to our consideration of the Teamsters Union's preemption argument.

III. THE FEDERAL DISTRICT COURT HAD PENDENT JURISDICTION TO AWARD COMPENSATORY AND PUNITIVE DAMAGES TO RESPONDENT UNDER THE OHIO COMMON LAW.

The courts below held (R. 275, C. L. 3; R. 292) that the Respondent's claim of unlawful secondary activity violative of Section 303, LMRA and Respondent's claim of unlawful activity violative of the common law of Ohio are not separate causes of action but merely different

grounds to support a single cause of action, the cause of action being the violation by the Teamsters Union of the Respondent's right to be free from unlawful interference with his business. In *Hurn vs. Oursler*, 289 U. S. 238, this Court held (p. 246) that when a case presents a substantial federal question, the trial court has jurisdiction to dispose of all grounds, either federal or state, which are in support of a single cause of action. There, a suit was filed in the United States District Court seeking redress for copyright infringement which raised a substantial federal question and sought to obtain relief, as well, upon the ground that identical acts constituting the alleged infringement were also unfair competition under the state law. It was held by this Court that the federal question raised by the pleadings gave the court jurisdiction; and that, although the federal claim was rejected on the merits, the district court still possessed jurisdiction to decide the claim of unfair competition on the merits.¹²

The Teamsters Union accuses (Br., p. 29-30) the lower courts of misreading and misapplying *Hurn vs. Oursler*, 289 U. S. 238. It is the Teamsters Union, however, that has misread and misapplied that case to the facts of this case. This Court, in the *Hurn* case, drew a distinction (289 U. S. 246) between one cause of action resting on identical facts and different causes of action resting on different facts and held that a federal court may retain jurisdiction and apply a state's common law only in the former case. Here the Teamsters Union argues (Br., p. 29) that "Respondent's proof of loss of the Launder account rested on a set of circumstances wholly separate and distinct from his proof of alleged Section 303 viola-

¹² The case now before the Court is stronger for the Respondent than the *Hurn* case because here the federal claim was not rejected on the merits. The Teamsters Union has been found to have violated Section 303, LMRA.

tions. Different times, places and persons were involved." But the Teamsters Union fails to consider the District Court's Findings of Fact and Conclusions of Law on this point. It will be recalled that the District Court found (R. 272-5, F. F. 6(b), 7(b) and 9(b), C. L. 5) that the identical acts of the Teamsters Union that constituted violations of Section 303, LMRA with respect to Respondent's customers O'Connel and Schoen and Respondent's supplier France also constituted violations of the state common law. This case then falls squarely within the rationale of *Hurn vs. Oursler*.

Further, as this Court observed in *Hurn vs. Oursler*, 289 U. S. at 246, "A cause of action does not consist of facts but of the unlawful violation of a right which the facts show." Thus, Respondent's common law cause of action does not consist of the facts pertaining solely to the Launder matter or solely to one or more of the O'Connel, Schoen, and France matters. As the District Court found:

"The claim of unlawful secondary activity violative of 29 U. S. C. A., Section 187, and unlawful secondary activity violative of the common law of Ohio are not separate causes of action but are merely different grounds to support a single cause of action, the cause of action being the violation by the Defendant of Plaintiff's right to be free of unlawful interference with his business." (R. 275, C. L. 3.)

Since the identical acts of the Teamsters Union involving Respondent's customers Schoen and O'Connel and Respondent's customer France resulted in violations of Section 303, LMRA and the state common law, the District Court had jurisdiction to apply the state common law to Respondent's entire cause of action. Since the Launder element of damages was merely a part of the single cause of action, the District Court had pendent jurisdiction to grant damages under the state common law.

As indicated by the cases cited in the footnote,¹³ the doctrine of ancillary or pendent jurisdiction is a rule of

¹³ The doctrine of ancillary or pendent jurisdiction has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn vs. Oursler*, *supra*; *Armstrong Paint and Varnish Works vs. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *In re Amtorg Trading Corp.*, 75 F. (2) 826 (Ct. of Patent App., 1935); *Edelmann & Co. vs. AAA Specialty Company*, 88 F. (2) 852 (C. A. 7, 1937); *Sinko vs. Snow-Craggs Corporation*, 105 F. (2) 450 (C. A. 7, 1939); *Maternally Yours vs. Your Maternity Shop*, 234 F. (2) 538 (C. A. 2, 1956).

(2) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company vs. Van Hoosear*, 72 F. (2) 903 (C. A. 9, 1934); *Strachman vs. Palmer*, 177 F. (2) 427 (C. A. 1, 1949); *Chicago Great Western Railway Co. vs. Chicago, Burlington and Quincy Railway Co.*, 193 F. (2) 975 (C. A. 8, 1952).

(3) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion vs. Connell*, 236 F. (2) 447 (C. A. 9, 1956); *Jung vs. K & D Mining Co.*, 260 F. (2) 607 (C. A. 7, 1958).

(4) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *South Side Theatres vs. United West Coast Theatres Corporation*, 178 F. (2) 648 (C. A. 9, 1949); *Braddick vs. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(5) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company vs. Owensboro Milling Company*, 222 F. (2) 109 (C. A. 6, 1955).

(6) In cases wherein a claim against a labor union under Section 303, LMRA, is combined with a claim for compensatory and punitive damages under state common law in such cases as *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959) cert. den. 359 U. S. 1013; *William G. Gilchrist, Jr., et al. vs. United Mine Workers*, 290 F. (2) 36 (C. A. 6, 1961), cert. den. 368 U. S. 875; *United Mine Workers vs. Osborne Mining Co., Inc.*, 279 F. (2) 716 (C. A. 6, 1960), cert. den. 364 U. S. 881; and *Flame Coal Company vs. United Mine Workers*, 303 F. (2) 39 (C. A. 6, 1962), cert. den. 371 U. S. 891.

general application which has been applied in a great variety of types of cases. The Teamsters Union argues, however (Br., p. 27) that "Pendent jurisdiction assumes the existence of a state ground in support of a federal claim" and (Br., p. 28) "Since the state courts had no jurisdiction over Respondent's common law claim, the federal courts had none."

Although the Court of Appeals below specifically stated (R. 293) that it was not deciding that a state court is preempted from entertaining such a suit as this and awarding damages under the state common law, it further stated that "A nonfederal cause of action is not extinguished because a state court is preempted by federal law from providing relief." The Court of Appeals below also said (R. 292):

"(The Teamsters Union) contends that a federal court is without jurisdiction to entertain a suit for damages based on a secondary boycott unlawful under state law even though the suit also seeks damages under Section 303 for an unlawful secondary boycott. This contention is directly contrary to the holding in the 1933 decision of *Hurn v. Oursler*, 289 U. S. 238, as well as that in a number of recent cases decided by this court. Included among these are *Flame Coal Company v. United Mine Workers of America*, 303 F. 2 39 (6 Cir., 1962); *White Oak Coal Company v. United Mine Workers of America*, decided May 24, 1963, -- F. 2 -- (6 Cir.); *United Mine Workers of America v. Meadow Creek Coal Company*, 263 F. 2 52 (6 Cir., 1959), certiorari denied, 359 U. S. 1013; and *United Mine Workers of America v. Osborne Mining Co.*, 279 F. 2 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887. (The Teamsters Union) contends that since there was no violence in the instant case a different rule applies. We are not aware of such a distinction and in fact are unable to appreciate any legal or

logical reason for such a jurisdictional distinction
* * *

Although there was actual violence involved in the *Meadowcreek*, *White Oak*, *Flame* and *Osborne* cases, jurisdiction of the federal court to grant damages under state common law was not founded upon such violence but upon the rationale of *Hurn vs. Oursler*, 289 U. S. 238.¹⁴ Thus, the Court of Appeals below correctly held that the District Court had jurisdiction to award compensatory and punitive damages under the state common law.

We submit, however, that, in any event, the state court could have properly granted exactly the same relief herein as was granted by the District Court below.¹⁵ The Teamsters Union's argument (Br., p. 16 et seq.) is based primarily upon this Court's decision in *San Diego Building Trades Counsel vs. Garmon*, 359 U. S. 236 and we proceed to our consideration of that argument.

¹⁴ See *United Mine Workers of America vs. Meadow Creek Coal Company*, 263 F. (2) at 60; *United Mine Workers of America vs. Osborne Mining Co.*, 279 F. (2) at 724; *Flame Coal Company vs. United Mine Workers of America*, 303 F. (2) at 42; and *White Oak Coal Company vs. United Mine Workers of America*, 318 F. (2) at 606.

¹⁵ The Court of Appeals below implied (R. 293) that the state court erred in holding that it did not have jurisdiction of this action and Respondent now subscribes to the Court of Appeals' proposition. In any event, the state court correctly understood that the federal courts would have jurisdiction of this cause of action which is based upon violations of Section 303, LMFA and the state common law. Accordingly, the state court dismissed the action " * * * without prejudice to a new action based upon the subject matter * * * " (R. 266).

A. The Union Activity for Which the District Court Granted Compensatory and Punitive Damages Under the State Common Law Involved Imminent Threats to the Public Order and Accordingly Such Damages Were Properly Awarded Thereunder.

The Teamsters argument¹⁶ as to the absence of actual violence in this case requires consideration of *San Diego Building Trades Counsel vs. Garmon*, 359 U. S. 236 (1959); *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Russell*, 356 U. S. 635 (1958); *United Construction Workers, etc. vs. Laburnum Construction Corp.*, 347 U. S. 656 (1954); and *Youngdahl, etc. vs. Rainfair, Inc.*, 355 U. S. 131 (1957).¹⁷

The *Garmon* case of course held that the California state court could not grant a monetary judgment against a union for violation of the state's statutory law; where the union's conduct was peaceful and involved no imminent threats to the public peace and order. In *Garmon* (359 U. S. at 247) this Court said:

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell*, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; *United Construction Workers, etc. v. Laburnum Const. Corp.*, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed.

¹⁶ Referred to on page 21 of its brief.

¹⁷ It must be remembered, however, that Section 303, LMRA, was not involved in *Garmon*, *Russell*, *Laburnum* and *Youngdahl*, whereas the Teamsters Union has violated Section 303, LMRA, in this case.

2d 151; *United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Wisconsin Employment Relations Board*, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."

If, as the Teamsters Union contends, *Garmon* (together with the *Laburnum*, *Russell* and *Youngdahl* cases discussed therein) is authority to be applied here, that authority must be applied properly and not as the Teamsters Union suggests. The *Garmon*, *Laburnum*, *Russell* and *Youngdahl* cases hold that state courts applying state law cannot enjoin or award damages against unions for conduct arguably constituting an unfair labor practice under the Labor Management Relations Act unless there is either violence or an imminent threat to the public order. The *Garmon* case involved neither violence nor an imminent threat to the public order. The *Laburnum*, *Russell* and *Youngdahl* cases, like the instant case, involved no actual physical violence but did involve imminent threats to the public order. The nature of the conduct involved in *Laburnum* and *Russell* is reviewed in footnote 4 of each decision where it appears that although there were threats there was no actual physical violence.

In *Laburnum*, which affirmed a state court award of \$175,000.00 in compensatory and \$100,000.00 in punitive damages against a union which by threats but not by physical violence, demanded that plaintiff's employees join the union, with the result that the employer had to abandon its work, this Court held, 347 U. S. at 664, that Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages caused by tortious conduct involving threats to

the public order even though such conduct constituted an unfair labor practice under the Labor Management Relations Act.

As this Court observed in *Laburnum* (347 U. S. 666), under the National Labor Relations Act of 1935, there were no prohibitions of unfair labor practices on the part of labor organizations, but there would have been no doubt that labor organizations would have been held liable in tort actions for the type of activity involved in this case. "The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct" (347 U. S. 666). Further, *Laburnum* reminds us (347 U. S. 669) that if a state law cannot be applied in a case of this type, the offenders, by coercion, may destroy property without liability for the damage done.

In *Russell*, which affirmed a state court award of compensatory and punitive damages in a total amount of \$10,000.00 against a union, in an action arising out of conduct violative of the Labor Management Relations Act where, by intimidation but not by actual physical violence, the union denied a worker access to a plant during a strike, this Court held, 356 U. S. 641-2, that the fact that the Labor Management Relations Act provided a means of "partial" relief by way of a monetary award of back pay, did not preclude a victim of a common law tort involving intimidation and threats to the public order from a common law action for all damages suffered. Likewise, in this case, the fact that the Labor Management Relations Act provided a measure of partial relief by way of a suit for damages for certain types of secondary activity will not preclude a victim of the common law tort of secondary boycott activity involving intimidation and threats to the

public order, from a common law action for all damages suffered.

Russell did not involve any actual violence. Like the part of this case that is based on Ohio's common law, *Russell* involved "threats of violence" (356 U. S. 638), and was an action for compensatory and punitive damages for a "willful and malicious" (356 U. S. 636) common law tort. There is nothing in the *Russell* opinion to indicate that *Russell*, or any of the 29 other employees who had filed similar cases arising out of the same strike (356 U. S. 656) had any fear for their personal safety. The activity complained of in this case caused employees, understandably, to be concerned for their safety (R. 274, F. F. 10). The union conduct complained of in *Russell* took place at the scene of the primary picket line (356 U. S. 636) and not at isolated rural gravel pits, as in this case (R. 46-52, 73, 97-8, 104).

In *Youngdahl*, this Court approved the issuance of a state court injunction to the extent that it enjoined a striking union that had not engaged in actual violence against conduct consisting of verbal insults and name calling that was calculated to provoke violence. In that case the union relied heavily on the argument that there had been no actual violence but this Court held (355 U. S. at 138) that the issue was whether "the conduct and language of the strikers were likely to cause physical violence" (emphasis added); that words can readily be so coupled with conduct to provoke violence; and that the trial court "was in a better position (than this Court) to assess the local situation (and to conclude that) the conduct and massed name calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained."

The Teamsters Union's Intimidation and Threats to the Public Order.

Although the instant case did not involve actual physical violence, it certainly involved "imminent threats to the public order." The strike commenced August 17, 1956 (R. 270, F. F. 2). On the first day of the strike the Teamsters Union sent 25 to 30 men (R. 44) to picket the Respondent's premises and this number of pickets was approximately half the size of Respondent's entire work force. The picketing continued the second day of the strike with approximately the same number of pickets involved (R. 46).

When it became apparent that the Teamsters Union's activity at the primary picket line was not going to be effective to cripple the Respondent's business, the Teamsters Union caused some of the employees that did go to work to be followed in automobiles by strikers and agents of the Teamsters Union. Two of Respondent's employees (R. 82 and 102) testified that on the third day of the strike they reported for work and were followed by automobiles driven by Teamsters Union agents and members as they left Respondent's premises and as they went to a rural gravel pit to load sand and that such following continued all of the way to Toledo, Ohio, where Teamsters Union pickets met the Respondent's truck drivers at Respondent's customer's premises, with picket signs at such customer's gate (R. 56-60, 81-86, 133-145).

The trailing of lone truck drivers down country roads by carloads of Teamsters Union agents and strikers was well calculated to intimidate and threaten such truck drivers. This course of action by the Teamsters Union was effective to cause an employee who did not want to risk getting hurt from crossing the picket line to report to work (R. 274, F. F. 10).

On the fourth day of the strike, August 21, 1956, the Common Pleas Court of Seneca County, Ohio considered it necessary to issue an order against the Teamsters Union with respect to the strike involved in this action and ordered the Teamsters Union to refrain from engaging in mass picketing, from secondary boycott activity and from following the Respondent's employees on the public highways or elsewhere (R. 270-1, F. F. 3).

The Respondent's employees never knew when they might next be encountered by Teamsters Union agents because such employees knew that the strike activity was not being confined to the Respondent's premises. In violation of the restraining order (R. 272, F. F. 6), the state common law and Section 303, LMRA,¹⁸ the Teamsters Union engaged in picketing at the premises of Respondent's customer, The France Stone Company. The Teamsters Union also requested the employees of France, by contacting the union steward of those employees, to force their employer to cease doing business with the Respondent (R. 46-52, 73, 97-8, 104).

In violation of the restraining order (R. 139) and the

¹⁸ The Teamsters Union's secondary picketing at the France stone quarry continued for at least two full days and only a few of Respondent's trucks made trips to that quarry during those two days (R. 46-52, 104) and remained there only long enough to be loaded with sand or gravel. Thus, the Teamsters Union engaged in secondary picketing at the France stone quarry when Respondent's trucks were not there and when picketing was being conducted at Respondent's garage terminal. Even when Respondent's trucks were on the France premises, the secondary pickets were considerable distances from and not within sight of such trucks, except as such trucks passed through the quarry gates. Such secondary picketing violates Section 8(b)(4)(A), LMRA. *Schultz Refrigerated Service*, 87 NLRB No. 82; *Moore Dry Dock Co.*, 92 NLRB No. 93; Cf.: *Brownfield Electric, Inc.*, 145 NLRB No. 113. As the Teamsters Union observes (Br. page 36, footnote 27) union conduct that violates Section 8(b)(4) also violates Section 303. *Longshoremen vs. Juneau Corp.*, 342 U. S. 237, 244.

state common law, the Teamsters Union approached the management of the Respondent's customer, Schoen, two or three times during the strike, and encouraged Schoen to cease doing business with the Respondent during the strike (R. 133-145).

Further, the Teamsters Union, in violation of the restraining order (R. 87) and the common law of Ohio, approached the management of the Respondent's customer Launder and requested such customer to cease doing business with the Respondent during the strike (R. 52-5, 86-90, 110-1).

As the result of the intimidation described above, it was unnecessary for the Teamsters Union to engage in actual violence.

The Teamsters Union filed a motion in the state court to dissolve the restraining order on August 24, 1956, but the state court considered it necessary to keep the order in full force throughout the strike and the restraining order was not dismissed until the strike was settled, in October of 1956 (R. 238).

The trial court found (R. 275, F. F. 13-14) that the Teamsters Union's strike activity that violated the Ohio common law (some of which violated Section 303, LMRA) was undertaken "intentionally, maliciously and with wanton disregard of the legal rights of (the Respondent) and others" and awarded \$15,000.00 in punitive damages. The trial court stated (R. 289) that although the punitive damages awarded in the *Meadow Creek* (263 F. (2) 52, 55, \$100,000) and *Osborne* (279 F. (2) 716, 719, \$50,000) "were predicated upon the extreme violence that pervaded the strikes, we see no reason why the award of punitive damages should be limited to cases where violence is engaged in." With respect to punitive damages, the Court of Appeals said (R. 296):

"As to the punitive damage award of \$15,000.00, we cannot say that there was an abuse of discretion. The fact that the activities here engaged in did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable."

Surely this Court will agree that the massed name calling that occurred at the *primary* picket line in the *Youngdahl* case was not as likely to provoke violence and threaten the public order as the unlawful *secondary* activity involved in this case. A *non-striking employee* accompanied by other *non-striking employees*, crossing a picket line while being subjected to name calling and indecent gestures (as happened in *Youngdahl*) is not nearly as vulnerable to actual violence as is a *non-striking employee* who alone leaves the *primary* site in a truck to be followed by strikers and to be alone encountered by other strikers at rural gravel pits.

Accordingly, if, as the Teamsters Union argues, the preemption decisions of this Court are to be analyzed and categorized as to the presence or absence of intimidation and threats to the public order, this case must be placed alongside *Laburnum*, *Russell* and *Youngdahl* which involved intimidation and threats to the public order and not with *Garmon*, *supra*, *Electrical Workers Local 426 vs. Baumgartners Elec. Constr. Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 273, 91 N. W. 2d 663, and *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862, relied upon by the Teamsters Union in its petition for certiorari, which did not involve significant intimidation or threats to the public order.

Certainly, the intimidation and threats to the public order were as serious in this case as in *Laburnum*, *Russell*

and *Youngdahl*. The state court here considered it necessary to issue an order restraining mass picketing and secondary activity, which order was kept in effect throughout the strike, despite the Teamsters Union's efforts to have it removed. The federal District Court in this action concluded that the maliciousness and unlawfulness of the Teamsters Union's activities warranted granting punitive damages. The Court of Appeals agreed and noted that if the Teamsters Union had resorted to violence in addition to malicious violations of federal and state law greater punitive damages would probably have been justified. Finally, as this Court has said (*Youngdahl, etc. vs. Rainfair, etc.*, 355 U. S. 131, 138), the trial court was in a better situation than this Court presently is, to assess the local situation and to determine that the union conduct involved was calculated to provoke violence, with the result that the LMRA does not preempt the application of state common law thereto.

B. The Union Activity for which the District Court Granted Compensatory and Punitive Damages Under the State Common Law Was Neither Arguably Protected Nor Arguably Prohibited by the Labor Management Relations Act and Accordingly Such Damages Were Properly Awarded.

Here we shall start with and apply the *Garmon* principle that "When an activity (other than an activity subject to the prohibitions of Sections 301 and 303, LMRA)¹⁰ is arguably subject to Section 7 or Section 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the NLRB." *San Diego Building Trades*

¹⁰ The Teamsters Union in its brief, page 23, indicates, in effect, that this parenthetical phrase must be read into the *Garmon* principle. We agree.

Council, etc. vs. Garmon, 359 U. S. 236, 245. Since its decision in *Garmon*, this Court has been consistently careful to examine the facts in each labor case in which the question of state vs. federal jurisdiction has arisen, to determine whether the complained of activity was arguably protected or arguably prohibited by the LMRA.²⁰

According to *Garmon*, 359 U. S. 236, 246, if the NLRB has clearly determined or if "compelling precedent applied to essentially undisputed facts" establishes that the complained of activity is neither protected nor prohibited by LMRA, state jurisdiction (and state common law) may properly be applied.²¹ We submit that compelling precedent applied to the undisputed facts of this case establishes that the union activity here complained of was neither arguably protected nor arguably prohibited by the LMRA, with the result that compensatory and punitive damages were properly awarded therefor under the Ohio common law.

The Undisputed Facts.

The undisputed facts, with respect to the Teamsters Union's secondary activity that was violative of the state common law but not Section 303, LMRA, were, in part, as stated in the Teamsters Union's brief:

²⁰ For example: *In re: Green* (1962), 369 U. S. 689, 692-3; *Marine Engineers, etc. vs. Interlake Steamship Co.* (1962), 370 U. S. 173, 177-8; *Ex parte George* (1962), 371 U. S. 72, 73; *Local 438, etc. vs. Curry* (1963), 371 U. S. 542; *Inces Steamship Co. vs. International Maritime W. U.* (1963), 372 U. S. 24, 26-7; *Local 100 vs. Borden* (1963), 373 U. S. 690, 693-4; *Local 207, Iron Workers, etc. vs. Perko* (1963), 373 U. S. 701, 707; *Retail Clerks vs. Schermerhorn* (1963), ____ U. S. ____, 54 LRRM 2612, 2615; and *Liner vs. Jafco* (1964), ____ U. S. ____, 84 S. Ct. 391, 396.

²¹ In *United Construction Workers vs. Laburnum Construction Corp.*, 347 U. S. 656 at 665, this Court said: "to the extent * * * Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal liabilities for tortious conduct have been eliminated."

"* * * during the course of the strike against Respondent, Local 20 (Teamsters Union) 'contacted the management of Launder (Respondent's customer) * * * and asked that (Respondent's) trucks not be permitted to work * * * during the strike' (R. 273). As a result of this request Launder 'ceased doing business with' Respondent 'until the strike had been terminated' (R. 273). Compensatory damages in the amount of \$8,700.00 were awarded (R. 289) on the theory that this conduct 'violated the Ohio common law regarding unlawful secondary activity' (R. 275-6)." (Teamsters Union's brief, pp. 12-13.)

Further, on undisputed facts, the courts below held that, in violation of the state common law, the Teamsters Union requested the management of O'Connel (Respondent's customer) to refuse to use Respondent's trucks for hauling O'Connel's requirements of sand for the duration of the strike (F. 272, F. F. 7(c)).²² As a result, O'Connel ceased doing business with Respondent for the duration of the strike (R. 273). Damages in the amount of \$1,600.00 were awarded by the District Court and this award was affirmed by the Court of Appeals. (R. 289, 295.)

Further, on undisputed facts, the courts below held that, in violation of the state common law, the Teamsters Union requested the management of Schoen (Respondent's customer) to cease doing business with Respondent for hauling its requirements of sand during the strike (R. 274, F. F. 96).²²

Thus, the undisputed facts establish, and the lower courts held (R. 275-6, 295), that the Teamsters Union en-

²² The lower courts also found, on undisputed facts, that the Teamsters Union also encouraged O'Connel's employees and employees of France (Respondent's supplier) to engage in a concerted refusal to use or load Respondent's trucks for the purpose of requiring O'Connel to cease doing business with the Respondent, in violation of Section 303, LMRA (R. 272, 275) and the state common law (R. 275-6).

gaged in secondary activity, unlawful under the state common law, in applying pressure directly on Respondent's customers to encourage them to stop doing business with the Respondent during the strike.

On pages 18-19 of its brief, the Teamsters Union suggests that an award of compensatory and punitive damages based on a complaint alleging only that the union engaged in a common law secondary boycott would be reversed on the ground that the NLRB had exclusive jurisdiction, citing *Electrical Workers Local 426 vs. Baumgartners Elec. Construction Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 273, 91 N. W. (2) 663. The *Baumgartners* case does not by any means support the broad proposition for which it is cited by the Teamsters Union and that case is clearly distinguishable from this case. The activity complained of in *Baumgartners*. (See 91 N. W. (2) 663 at 669) was union activity violative of Section 8(b)(2), LMRA. Because the activity complained of was prohibited by LMRA and did not involve an imminent threat to the public order, the NLRB was held to have exclusive jurisdiction, 359 U. S. 498. But as will be shown below, the common law secondary activity here complained of was not even arguably prohibited or arguably protected by LMRA and the NLRB, therefore, had no jurisdiction with respect to it. In *Garmon*, 359 U. S. 236, 238, like *Baumgartners*, the activity complained of was found to have been prohibited by Section 8(b)(2), LMRA.²³

²³ On pages 17 and 18 of its brief the Teamsters Union, in footnotes 5 through 14, cites authority for its argument that "The range of the Labor Board's exclusive, primary jurisdiction is broad indeed." The following table, however, will demonstrate that the NLRB was held to have exclusive jurisdiction in those cases simply because the activity involved in each case was either protected or prohibited, or arguably so, by LMRA.

(Continued on following page)

The Compelling Precedent:

The Teamsters Union's Secondary Activity Violative of State Common Law Was Not Prohibited by LMRA.

The Teamsters Union has, of course, consistently maintained that the LMRA as enacted in 1947 does not prohibit the Teamsters Union's secondary activity complained of by the Respondent as violative of the state common law. See the Teamsters Union's brief, p. 14. In

²³ (Cont'd):

These cases in no way affect the power of a court to apply state law to activity neither arguably protected nor arguably prohibited by LMRA.

Case	Reason for Holding NLRB had Exclusive Jurisdiction.
<i>UMW vs. Arkansas Oak Flooring Co.</i> , 351 U. S. 62.	Arguable violation of Section 8(a)(5). (See page 69.)
<i>Amalgamated Ass'n vs. Missouri</i> , 10 L. Ed. 2d 763.	Activity protected by Section 7, LMRA. (See page 768.)
<i>Weber vs. Anheuser-Busch, Inc.</i> , 348 U. S. 468.	Arguable violation of Section 8(b)(4). (See pp. 477-9.)
<i>Amalgamated Ass'n vs. Wisconsin E. R. Board</i> , 340 U. S. 383.	Activity controlled by Section 8(a)(5) and (b)(3). (See p. 399.)
<i>UAW vs. O'Brien</i> , 339 U. S. 454.	Activity protected by Section 7. (See p. 457.)
<i>Youngdahl vs. Rainfair, Inc.</i> , 355 U. S. 131.	Activity protected by Section 7. (See pp. 137-8.)
<i>Hotel Employees Union vs. Sar Enterprises, Inc.</i> , 358 U. S. 270.	Activity protected by Section 7. (See p. 271.)
<i>Machinists Lodge 34 vs. L. P. Cavett Co.</i> , 355 U. S. 39.	Violation of Section 8(b)(2). (See 103 Ohio Appeals 45.)
<i>San Diego Bldg. Trades Council vs. Garmon</i> , 359 U. S. 236.	Arguable violation of Section 8(b)(2). (See p. 238.)
<i>Amalgamated Meat Cutters Local 427 vs. Fairlawn Meats, Inc.</i> , 353 U. S. 20.	Violation of Section 8(b)(2). (See p. 23.)
<i>Retail Clerks Union vs. J. J. Newberry Co.</i> , 352 U. S. 987.	Arguable Section 8(b)(2) violation.

(Continued on following page)

Local 1976, Carpenters vs. NLRB, 357 U. S. 93, 98-9, this Court said:

"Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Section 8(b)(4)(A). * * * Likewise, a union is free (so far as the LMRA is concerned) to approach an employer to persuade him to engage in a boycott, so long as it

²³ (Cont'd):

Garner vs. Teamsters Union, 346 U. S. 485. Arguable violation of Section 8(b)(2). (See pp. 488-9.)

Local No. 438 vs. Curry, 371 U. S. 542. Violation of Section 8(b). (See pp. 546-7.)

Farnsworth and Chambers Co. v. Local 429, IBEW, 353 U. S. 969. Arguable violation of Section 8(b), LMRA. (See 299 S. W. (2) 8, 9.)

Teamsters Local 24 vs. Oliver, 358 U. S. 283. Activity subject to Section 7 and 8(d). (See pp. 294-5.)

Teamsters Local 327 vs. Kerrigan Iron Works, Inc., 353 U. S. 968. Activity arguably subject to Section 7 or 8. (See 296 S. W. (2) 379, 382.)

General Drivers Local 89 vs. American Tobacco Co., 348 U. S. 978. Activity arguably subject to Section 7 or 8, LMRA. (See 264 S. W. (2) 250.)

McGray vs. Aladin Radio Indus., Inc., 355 U. S. 8. Activity arguably subject to Section 7 or 8, LMRA. (See 298 S. W. (2) 770, 777.)

Ex parte George, 371 U. S. 72. Activity arguably protected by Section 7. (See p. 73.)

Marine Engineers Ben. Asso. vs. Interlake S. S. Co., 370 U. S. 173. Arguable violation of Section 8(b). (See pp. 177-8.)

Liner vs. Jafco, 11 L. Ed. 2d 347. Conduct arguably subject to LMRA. (See 84 S. Ct. at 394-5.)

Electrical Workers Local 426 vs. Baumgartners Electrical Constr. Co., 359 U. S. 498. Violation of Section 8(b)(2). (See 91 N. W. (2) 663 at 669.)

Plumbers Union Local 298 vs. Door County, 359 U. S. 354. Violation of Section 8(b)(4). (See p. 356.)

Building Trades Council vs. Kinard Constr. Co., 346 U. S. 933. Activity subject to Section 7. (See 64 So. (2) 400, 403-4.)

refrains from the specifically prohibited means of coercion through inducement of employees." (Parenthetical phrase added.)

It only needs to be observed at this point that if the secondary activity here under discussion were prohibited by Section 303, LMRA, Respondent would be entitled to recover *thereunder* all of the compensatory damages granted Respondent herein.

The Compelling Precedent:

The Teamsters Union's Secondary Activity Violative of State Common Law Was Not *Protected* by LMRA.

This Court has held that the type of secondary activity here complained of as violative of the state common law "is not covered by the statute," *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99. Since the activity was "not covered" by the LMRA, it was not *arguably protected* thereby.

The Respondent recognizes that in *Garmon* (359 U. S. 236, 242) this Court said that preemption is "* * * concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." But this statement in the *Garmon* opinion preceded the statement of what the Respondent submits is the overriding principle established by the *Garmon* decision: if the Board has clearly determined or if compelling precedent applied to essentially undisputed facts establishes that the activities in question are not arguably protected nor arguably prohibited by the LMRA, such activities are subject to state jurisdiction. This Court stated the principle thus (359 U. S. 236, 246):

"In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether

such activities are subject to state jurisdiction." (Emphasis added.)

This principle has been consistently applied by this Court since its *Garmon* decision.²⁴

What this Court said of the "intermittent and unannounced work stoppages" in *Local 232 UAW vs. Wisconsin Employment Relations Board, et al. (Briggs-Stratton)*, 336 U. S. 245,²⁵ applies equally to a union's direct appeals

²⁴ *In re: Green* (1962), 369 U. S. 689, 692-3; *Marine Engineers, etc. vs. Interlake Steamship Co.* (1962), 370 U. S. 173, 177-8; *Ex parte George* (1962), 371 U. S. 72, 73; *Local 438, etc. vs. Curry* (1963), 371 U. S. 542; *Ingres Steamship Co. vs. International Maritime W. U.* (1963), 372 U. S. 24, 26-27; *Local 100 vs. Borden* (1963), 373 U. S. 690, 693-4; *Local 207, Iron Workers, etc. vs. Perko* (1963), 373 U. S. 701, 707; *Retail Clerks vs. Schermerhorn* (1963), ____ U. S. ____, 54 LRRM 2612, 2615; and *Liner vs. Jafco* (1964), ____ U. S. ____, 84 S. Ct. 391, 396.

²⁵ This decision "has remained fully intact, and, * * * underlay the decisions in *Laburnum and Russell*." Concurring opinion, *San Diego Bldg. Trades vs. Garmon*, 359 U. S. 236, 253. Although, as noted in *NLRB vs. Insurance Agents' Int. Union*, 361 U. S. 477, 493, footnote 23, "the approach to preemption taken in *Briggs-Stratton* * * * (i.e.) that the state courts and this Court on review (are) required to decide whether the activities were either protected by Sec. 7 or prohibited by Sec. 8 * * * is 'no longer of general application,'" it is submitted that the *Briggs-Stratton* case is still otherwise applicable to this case. Further, we recognize that the dissenting opinion in the *Briggs-Stratton* case (336 U. S. 266, footnote 1), stated that "It was held in *NLRB vs. Peter Cailler Kohler Swiss Chocolates Co.*, 2 Cir., 130 F. (2) 503, 505, 506, that the right to engage in a sympathetic strike or a secondary boycott was a concerted activity protected by Sec. 7 prior to the 1947 amendments." The *Peter Cailler* case however did not involve an appeal by a striking union direct to the struck employer's customers and therefore did not hold that such activity is or was protected. That case held that a resolution adopted by the union representing the employees of a chocolate company, protecting the company's action in regard to a milk strike by a cooperative dairy farmers' association was a "concerted activity for mutual aid or protection of employees" within the protection of the N.L.R.A., so as to make the discharge of the union's president for instigating the passage and publication of the resolution an "unfair labor practice." On the other hand, for example, when presented with a case in which an employer had discharged employees who, in sympathetic

(Continued on following page)

to the management of a struck employer's customer, since this Court said in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99, that the latter activity is likewise "not covered" by the LMRA:

"Congress has not seen fit in either (the National Labor Relations Act, 49 Stat. 449, or the LMRA) to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control * * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude states from exerting their police power must be clearly manifested'." 336 U. S. 252-3.

Neither the "intermittent and unannounced work stoppages" involved in *Local 232 UAW vs. W.E.R.B.*, 336 U. S. 245, nor the union's direct appeal to the Respondent's customer Launder in this case is protected by Section 7²⁶ or Section 13²⁷ of the LMRA and what this Court said in the former case is equally applicable here:

²⁵ (Cont'd):

support of fellow union members on strike at a different plant refused to handle orders from the struck plant, the Eighth Circuit declined to rule that the "mutual aid or protection" language of Sec. 7 of the NLRA was meant to encompass such conduct. *NLRB vs. Montgomery Ward*, 157 F. (2) 486, 496.

²⁶ Section 7, LMRA (29 USC Sec. 157) provides in part: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing; and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The direct appeal by the Teamsters Union's business agent to the management of Respondent's customer Launder was not protected by Section 7 for the further reason that such appeal was not concerted activity by Respondent's employees.

²⁷ See following page.

"In the light of labor movement history, the purpose of (Section 7) becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. *But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert.* 336 U. S. 245, 257-8 (Emphasis added.)²⁸

* * *

"That Congress has concurred in the view that neither Section 7 nor Section 13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike. The House Committee of Conference handling the bill which became the Labor Management Relations Act, on June 3, 1947 advised the House to recede

²⁷ Section 13, LMRA (29 USC, Sec. 163): "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

²⁸ As stated in *NLRB vs. Electronics Equipment Co.* (CA-2) 194 F. (2) 650, 652, the NLRB has held that "union activity is not protected under section 7 LMRA merely because it does not constitute an unfair labor practice, to which the Board is authorized to attach penalties. *The American News Co.*, 55 NLRB 1302; *Thompson Products Co.*, 70 NLRB 13, as amended in 72 NLRB-886." Likewise, in this case, it cannot be argued that a striking union's appeals direct to the struck employer's customer is protected merely because it is not prohibited by LMRA.

from its disagreement with the Senate and to accept the present text upon grounds there stated under the rubric 'Rights of Employees.' H. R. Rep. 510, 80th Cong., 1st Sess., p. 38. The Committee pointed out that 'the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. * * *.' 336 U. S. 245, 260.

* * *

"And Section 13 plus the definition only provides that 'Nothing in this Act * * * shall be construed so as to interfere with or impede' the right to engage in these activities. What other Acts or other state laws might do is not attempted to be regulated by this section. Since reading the definition into Section 13 confers neither federal power to control the activities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the right of the state to resort to its own reserved power over coercive conduct as it has done in this instance." 336 U. S. 245, 263-4.

A striking union's appeals direct to the struck employer's customer has long been and is violative of the Ohio common law.²⁹ As noted in the foregoing quotation, this Court has held that Section 7, LMRA did not make illegal action legal and Section 13, LMRA does not attempt to regulate what state law might do. This supports this Court's statement in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99 to the effect that a striking union's appeals

²⁹ 33 Ohio Jurisprudence (2) Section 64, Secondary Boycott, pages 187-8; *Moore & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547 (1947); and *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541.

direct to an employer are not covered by the LMRA. Because this Court has held that Section 7, LMRA did not make illegal action legal and because the activity here complained of has long been illegal under the state common law, such activity cannot be said to be "arguably protected" by Section 7, LMRA.

Further, the Respondent Submits that Congress, in its enactment of the LMRA in 1947, *intended*, in Section 8(b) and Section 303, LMRA to outlaw and make compensable under the Act, the type of secondary activity described above and found by the courts below to have been violative of the state common law. In *Local 1976 Carpenters v. NLRB*, 357 U. S. 93, this Court held that Congress failed to do so. Surely, the secondary activity here complained of (i.e., the union appeals direct to Respondent's customers, without the latter's employees being contacted or encouraged) cannot be held to have been *protected* by LMRA when Congress intended, albeit unsuccessfully, to *prohibit* such activity.

Senator Taft's explanation of the secondary boycott provisions of the 1947 Act, as quoted in *NLRB vs. Denver Building Trades* (1951), 341 U. S. 675, 686, discusses secondary boycott activity in very broad terms and establishes, we submit, that he understood that all secondary activity would be outlawed and made compensable, for the first time under federal law, by LMRA Sections 8(b) and 303:

"Senator Taft, who was the sponsor of the bill in the Senate and was the Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, said, in discussing this section: '* * * under the provisions of the Norris-LaGuardia Act (29 U. S. C. A. Section 101 et seq.), it became impossible to stop a secondary boycott or any other kind of a strike,

no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair practice.' 93 Cong. Rec. 4198."

This Court has held that the 1959 amendments to the LMRA are "relevant consideration(s)" in determining the meaning of the LMRA as adopted in 1947. *NLRB vs. Drivers, etc., Local Union #639*, 362 U. S. 274, 291. Accordingly, we look to the legislative history of the 1959 amendments and find that the Senate Minority Report to original S. 1555 contains the following discussion with respect to the language that was finally made a part of S. 1555, thereby amending Section 8(b)(4), and Section 303, LMRA, so as to proscribe pressure applied directly against secondary employers, without their employees being involved:

"VI. Secondary Boycotts.

"* * *

"The basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer. Congress thought it had achieved this objective when, in adopting the Taft-Hartley Act in 1947, it enacted section 8(b)(4) of the National Labor Relations Act. Unfortunately, decisions of the National Labor Relations Board and the courts have no interpreted section 8(b)(4) as to leave a number of gaping loopholes through which genuinely neutral

employers and their employees continue to be victimized by the use of the secondary boycott. (Emphasis added.)

"The major loopholes in the present ban on secondary boycotts are:

"(1) *Coercion of employers.*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in the present law. The prohibition is against the threatening or urging of the 'employees' of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. * * *

"The bill, S. 478, meets this problem by amending section 8(b) (4) of the present law to make the restriction apply to 'threaten, coerce, or restrain any person engaged in commerce * * *' as well as 'induce or encourage any individual employed by any person.'" U. S. Code Cong. and Adm. News (1959), 2382-3.

Since the enactment of LMRA in 1947 was intended to outlaw the type of secondary activity here complained of, that Act cannot be said to protect such activity.

The Respondent is not, of course, arguing at this late date that this Court was wrong in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, and that Congress was successful in 1947 in intending to outlaw inducement and coercion of the management of a primary employer's customers and suppliers in the enactment of original Sections 8(b) and 303, LMRA. The Respondent does contend that this Court was correct, in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99, in holding that such activity was *neither* arguably prohibited *nor* arguably protected by LMRA.

The whole sense of the legislative history of the enactment of the LMRA in 1947 is that Congress was opposed to secondary strike activity *generally* and may have intended to proscribe it, *generally*. It is not possible to even *argue* that Congress intended to, or did, *protect* direct inducement and coercion of the management of a primary employer's customers; and this Court has foreclosed the argument that such activity was *prohibited*, in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93.

Since "upon compelling precedent applied to essentially undisputed facts" (*Garmon*, 359 U. S. 236, 246), the Teamsters Union's secondary activity complained of by Respondent as violative of the state common law, was neither arguably protected nor arguably prohibited by LMRA, the District Court was free to award compensatory and punitive damages based upon the state common law.

CONCLUSION.

When the Teamsters Union's lawful primary strike proved ineffective to cripple Respondent's business, the Teamsters Union brought pressure to bear upon the Respondent's customers and suppliers. The Court of Appeals held (R. 295) that "The findings of fact of the district judge as to secondary boycott activities violative of Section 303, LMRA and of the state common law are amply supported by the evidence and are not clearly erroneous. *Commissioner of Internal Revenue vs. Duberstein*, 363 U. S. 278, 291." The Court of Appeals also held (R. 296) that "The basis upon which the lower court awarded compensatory damages in the amount of \$19,619.62 was a reasonable and justifiable one" and "As to the punitive damage award of \$15,000.00, we cannot say that there was an abuse of discretion. The fact that the

activities here did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable."

The Teamsters Union cannot argue that it did not damage the Respondent in an amount at least equal to the award of damages herein or that its activities for which compensatory damages were awarded were not done maliciously and with wanton disregard of Respondent's rights.

The Teamsters Union violated Section 303, LMRA and Respondent is entitled to recover damages thereunder. These damages include the profit lost by the Respondent as a consequence of not having enough truck drivers report for work during the strike, since the lack of drivers was caused by a combination of the Teamsters Union's various activities, part of which were lawful, part of which were violative of Section 303, LMRA and part of which were violative of the Ohio common law.

The complaint herein sets forth but one cause of action and the identical acts of the Teamsters Union which violated Section 303, LMRA also violated the Ohio common law. Accordingly, the courts below had jurisdiction to award damages under such common law.

This Court's opinion in *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236, does not require a different result. And, in any event, the courts below were correct in awarding all of the damages awarded because, even under *Garmon*, state common law can be applied since this case involved imminent threats to the public order and since the activity for which damages have been awarded under the state common law was neither arguably protected nor arguably prohibited by the Labor Management Relations Act of 1947.

For the foregoing reasons, the judgment below should
be affirmed.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX A.

Section 303 of the Labor Management Relations Act of 1947 provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to

conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1963

No. 485

**LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION,
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vs.

**LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY, *Respondent.***

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

**I. IN AN EFFORT TO REFUTE LOCAL 20's POSITION,
THE RESPONDENT HAS DEVELOPED NEW, AND
REFORMULATED HIS OLD, ARGUMENT**

This brief is addressed to these arguments, which are:

(1) This case involves "threats to public order and intimidation." (Resp. Br. p. 35)

(2) The loss of the Wilson account is, in part, attributable to picketing at secondary sites. (Resp. Br. p. 15)

(3) The "Union activity for which the District Court granted compensatory and punitive damages under the State common law was neither arguably protected nor arguably prohibited by . . . Act" (Resp. Br. p. 39)

(4) The "totality of effort" rule is an application of established principles of the law of damages. (Resp. Br. pp. 17-23)

Before turning to these arguments, we note that Respondent failed to discuss, much more to meet, Local 20's position that Congress, in creating Section 303, intended that it should provide the sole basis for damages flowing from peaceful conduct during a labor dispute, and, accordingly, damages based upon state policy have no role to play (Pet. Br. pp. 22-26).

In the absence of any such answer, we ordinarily would not burden this brief with further discussion of the point. However, an intervening decision of this Court prompts additional comment. In *Sears Roebuck & Co. v. Stiffel Co.*, 11 L.Ed.2d 661, the Stiffel Company sued Sears in the federal district court alleging that Sears had infringed its patents and engaged in unfair competition as defined by Illinois law. The lower courts held the patent invalid but awarded damages under Illinois law. The Stiffel Company did not contest the invalidation of its patent. Sears sought review of the damage award which had been predicated upon state law. On certiorari, this Court reversed the judgment which awarded damages under state law, stating in part (11 L.Ed.2d at 667):

"Just as a state cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws."

In short, when Congress enacted Section 303, it contemplated that the peaceful conduct there prohibited

would constitute the sole basis for an award of damages and that labor unions engaged in labor disputes would be otherwise free from liability for damages resulting from peaceful activities. To award damages for the loss of the Launder account and to assess punitive damages—neither of which are bottomed upon Section 303—is surely to give employers “protection of a kind that clashes with the objectives of the federal” labor laws. (Cf. *Stiffel Co.*, 11 L.Ed. at 667.) It is, therefore, submitted that such damages cannot be sustained.

II. THE RECORD DEMONSTRATES THAT THERE WAS NO THREAT TO PUBLIC ORDER OR INTIMIDATION AND THAT THE LOSS OF THE WILSON ACCOUNT WAS UNRELATED TO THE SECONDARY PICKETING

A. The “Threats to Public Order and Intimidation”

Respondent's first argument that the judgment can be sustained because of threats to public order and intimidation—an argument which made its debut in Respondent's brief in opposition to Local 20's petition for writ of certiorari—has been covered in the briefs previously filed in this Court (Pet. Reply Brief in Support of Pet. for Writ of Cert., pp. 1-7; Pet. Br. on the Merits, pp. 32-34). We reply again because of the strong reliance placed on this point by Respondent.

The *only* witness Respondent called whose testimony is even remotely supportive of his claim was one Taulbee; and Taulbee “never seen no trouble” (R. 199). Respondent, in his brief on the merits, attempts to bolster—and bolstering is indeed necessary—Taulbee's testi-

mony with two factual representations not supported by the Record. First, Respondent says (Br. p. 35):

"On the first day of the strike the Teamsters Union sent 25 to 30 men (R. 44) to picket the Respondent's premises. . . ."

But the testimony of Respondent's witness on cross-examination was as follows (R. 62, 63, 64):

"Q. On the first day of the strike were any of the cars parked in the driveway areas leading in and out of Mr. Morton's premises?"

A. Not in the driveways, no.

Q. At any time did you observe any of the cars parked across the driveways entering into Mr. Morton's premises; that is, a car permanently left there in the driveway?

A. No.

Q. Were the men who appeared at the scene of the picket line on the first day of the strike milling around in the area of their cars, standing around in groups and talking among themselves and things like that?

A. Yes.

Q. Were they standing in groups in the driveway areas?

A. No, not in the driveways.

Q. As a matter of fact, at no time during that first day of the strike were the driveways physically blocked either by the men themselves or by their automobiles, were they?

A. No, they wasn't blocked.

Q. You said that on the first day of the strike a

few [fol. 86] trucks came out of Morton's premises during the time you were picketing. At any time did you observe the driveways being physically blocked by cars or men?

A. No.

Q. Before the court order was given to you or called to your attention, Mr. Combs, how many men were actually in possession of picket signs and walking with those signs in their possession, do you recall that?

A. Well, all of us didn't walk at the same time with them, but there would be about four or five men, I would say, with paper signs and we had some drove in by the driveways."

Handicapped by a star witness who "never seen no trouble" (R. 199), Respondent has conjured up "25 to 30" pickets who never existed. Not satisfied, Respondent adds (Br. p. 39):

"The state court here considered it necessary to issue an order restraining mass picketing and secondary activity, which order was kept in effect throughout the strike, despite the Teamsters Union's efforts to have it removed."

Only one witness testified concerning the issuance of the state court order. In material part, he said (R: 230-231):

"Q. What was the nature of that litigation?

A. The plaintiff in this cause of action, Lester Morton, was also a plaintiff in an injunctive type proceeding in the state court. He had filed a Petition and an application for an injunction.

Q. I show you Plaintiff's Exhibit 2. Was this the injunction you are talking about?

A. Yes. This is a copy of the order, or journal entry, which was granted ex parte by the Judge of the Common Pleas Court of Seneca County.

Q. After the issuance of the ex parte order, Mr. Gallon, were any hearings held in the state court for further injunctive relief?

A. Yes. Some time within I believe a week after the issuance of this ex parte order, pursuant to a motion filed by myself on behalf of defendants in that action, a hearing was to be held in regard to the motion to vacate the injunction. [fol. 443] About the same time the attorney for the plaintiff had filed a motion for temporary injunction as well as, I believe, a citation for contempt and there was to be a hearing had primarily on those matters, I think.

Q. Was a hearing ever held?

A. It was begun, testimony was taken, but some time during the testimony at the judge's suggestion, I believe—and this was a different judge who had granted the order, the ex parte order — the hearing was recessed for the parties to negotiate a settlement of their differences, if possible.

Q. Was there ever a ruling based on the evidence by any of the state judges with respect to the matters in the complaint or petition for temporary injunction?

A. There never was."

Thus, at no point in the state court proceedings did any judge render an opinion or issue an order based upon the testimony of witnesses. The only state court hearing ever held "was recessed for the parties to negotiate a settlement of their differences. . . ." (R. 231). A

witness that "never seen no trouble," 25 to 30 pickets, that never existed, a trial that was recessed and never resumed—this is the record which Respondent says establishes "threats to the public order. . . ." (Resp. Br. p. 3).

B. The Wilson Account and the Picketing at Secondary Sites

Respondent's misunderstanding or misinterpretation of the record is not confined to his assertions concerning the alleged—but non-existent—"threats to public order and intimidations" but extends to his statement that the lack of drivers leading to the loss of the Wilson account was caused, in part, "by the Teamsters Union's unlawful activity . . . in unlawfully picketing at secondary sites" (Resp. Br. p. 15). Here, again, Respondent apparently is relying upon Taulbee's testimony. Yet Taulbee nowhere asserts that Local 20's picketing at secondary sites contributed to his alleged fear.

III. CONTRARY TO RESPONDENT, THE DISTRICT COURT COULD NOT APPLY OHIO LAW TO LOCAL 20'S REQUEST TO LAUNDER BECAUSE (A) SUCH A REQUEST IS A PROTECTED ACTIVITY; OR (B) EVEN IF IT WERE NOT A PROTECTED ACTIVITY, IT IS WITHIN THE AREA OF LABOR-MANAGEMENT LABOR RELATIONS PRE-EMPTED BY FEDERAL LAW

A. Requests to Employers to Boycott a Struck Employer Are Protected Activities

While Respondent is correct in his assertion that requests to customers of a struck employer to cease doing business with him are not arguably prohibited by the

Labor Management Reporting Act, 1947, he is wrong in his assertion that such requests are not arguably protected by the Act. It is clear such requests are protected activities. *National Furniture Mfg. Co., Inc.*, 134 NLRB 834, 850, 858 (1961), enf'd in part, 315 F.2d 280 (7 Cir., 1963); *Electronics Equipment Co., Inc.*, 94 NLRB 62 (1950), enf'd den. on other grounds, *NLRB v. Electronics Equipment Co., Inc.*, 194 F.2d 650 (2 Cir., 1952).

We need not demonstrate, however, that such requests are protected; we need only show that they are arguably protected. *San Diego Building Trades v. Garmon*, 359 U.S. 236. On the question whether such requests are arguably protected, this Court has spoken with a finality that leaves no room for doubt.

The request for cooperation addressed to Launder is not one bit different from requests involved in *San Diego Building Trades v. Garmon*, *supra*. In *Garmon*, the state court said (320 P.2d 473, at 475):

"As to the facts it appears that . . . the defendants placed pickets at the plaintiffs' place of business, had the plaintiffs' trucks followed, threatened persons about to enter the plaintiffs' place of business with economic interference and injury and that by such conduct they induced building contractors to discontinue their patronage."

In *Garmon*, the state courts awarded damages and this Court reversed.

Similarly, the state courts in *Grocery Drivers v. Seven Up Bottling Co.*, 359 U.S. 434 awarded damages because, *inter alia*, the union requested "transportation companies to refuse to deliver merchandise to

customers of plaintiff" and induced "purchasers of Seven Up to refrain from doing business with plaintiff . . ." 301 P.2d 631, at 633. This Court reversed, *per curiam*, on the basis of *Garmon*.

Since this Court in *Garmon* held that state law was inapplicable to "an activity . . . arguably subject to § 7 or § 8 of the Act" (359 U.S. at 245) and since, as Respondent concedes, the type of request before this Court was not even arguably prohibited by § 8 after this Court's earlier decision in *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, it follows that this Court concluded that such requests were arguably protected activities. (The dissenting opinion in *Garmon* is explicit on this point. 359 U.S. at 250, 254.)

Because this Court said a "boycott voluntarily engaged in by a secondary employer . . . is not covered by the statute" (*Local 1976 Carpenters v. NLRB, supra*, at 98-99), it does not follow that union inducement of a voluntary employer boycott is "not covered by the state." Section 7 affords no protection to activities of employers, but it does afford protection to activities of employees and their collective expression, labor organizations. Hence, Local 20's request is arguably, at least, protected by the Act.

B. Since, in any event, the Ohio Common Law of Secondary Boycott conflicts with the Purposes of Federal Labor Law, it Must Yield to that Law

Even assuming that federal law does not arguably protect Local 20's request to Launder, it does not follow that Ohio may prohibit such request. It is the existence of "potential conflict" between state and federal

purposes which determines "the extent to which state regulation must yield to subordinating federal authority." *San Diego Building Trades Council v. Garmon*, *supra*, at 241-242. For, if the state law applies to conduct that is of only "peripheral concern" (*Id.* at p. 24) to Congressional purpose, then there is an absence of potential conflict and state regulation is untouched. Even where "potential conflict" is present but state law is applied only to conduct involving interests "deeply rooted in local feeling," the states retain the power to act because in such limited instances potential conflict cannot, by itself, justify the inference of Congressional intent to deprive the states of such power (*Id.* at 243-244).

This exception to the general rule is, however, without significance in this proceeding (See Point II, *supra*). Hence, the issue here is whether the application of this state law to Local 20's conduct "potentially conflicts" with federal purposes or whether its application is of "peripheral concern" to those purposes.

We note at the outset that the Ohio common law of secondary boycott deals with labor relations, and more specifically with the type of conduct which Congress focused upon at the time it enacted Section 303. (See, generally, *Local 1976 Carpenters v. NLRB*, *supra*). Indeed, despite the holding below, it is far from clear that the Ohio common law, properly applied, would forbid any conduct not forbidden by Section 303. *W. E. Anderson Sons Co. v. Local 311, Teamsters*, 156 O.S. 541.

The conduct Ohio prohibited formed an integral part

of Local 20's effort to achieve its bargaining goals during its negotiations with Respondent (R. 20-21, 159, 185, 188-192, 201-209). Thus, the conduct was related to, and formed a part of, the process of collective bargaining. The promotion of this process is one of the fundamental purposes of federal law:

"The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, at 104.

The process of collective bargaining entails parties, negotiations, collective contracts, administration of collective contracts, and economic pressures. Federal labor law dominates each of these aspects. It determines who must and who must not engage in collective bargaining. *J. I. Case Co. v. NLRB*, 231 U.S. 332; *Garment Workers v. NLRB*, 366 U.S. 731. It determines the conduct during, and the subject matter of, the negotiations. *NLRB v. Katz*, 369 U.S. 736; *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149; *NLRB v. Wooster Div., Borg Warner Corp.*, 356 U.S. 342. It prescribes the form of the final agreement. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514. It sets limits to "the solutions that the parties' agreements can provide to the problems of wages and working conditions." *Local 24 Teamsters v. Oliver*, 358 U.S. 283 at 296; *NLRB v. Wooster Div., Borg-Warner, supra*; and it governs the administration of these solutions. *Teamsters Union v. Lucas Flour Co.*, *supra*. State law, therefore, yields to this federal control. *Hill v. Florida*, 325 U.S. 538; *Local 24 Teamsters v. Oliver, supra*; *Teamsters Union v. Lucas Flour Co.*, *supra*.

Federal law also governs the economic pressures which unions and employers may generate to support their bargaining positions:

“[T]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.” *NLRB v. Insurance Agents’ International*, 361 U.S. 477 at 495.

Thus, federal law protects, prohibits, and to the extent that it neither protects nor prohibits, it permits specific economic pressures. See, e.g., *Erie Resistor Corp. v. NLRB*, 10 L.Ed.2d 308; *Local 1976 Carpenters v. NLRB*, *supra*; *NLRB v. Insurance Agents’ International*, *supra*. As Respondent concedes (Reps. Br. p. 39), federal law renders state law inapplicable to economic pressures protected or prohibited by federal law. *San Diego Building Trades v. Garmon*, *supra*. Respondent argues, however, that states may prohibit those economic pressures that Congress neither prohibits nor protects (Resp. Br. p. 40). But as this Court noted in *Garner v. IBT*, 346 U.S. 485 at 499:

“For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.”

See also: *Retail Clerks v. Newberry*, 352 U.S. 987, reversing 298 P.2d 375 [picketing to induce consumer boycott preempted].

Respondent apparently fails to realize that state regulation of one aspect of collective bargaining affects all its aspects:

"The problems which arise during employee organization, the selection of a bargaining representative, the negotiation of a series of collective bargaining agreements and their day-to-day administration are all phases of a continuous human relationship. Government intervention at one point inevitably affects the whole course of events." Cox, *Federalism in Labor Law*, 67 Harv. L.Rev. 1297 at 1315 (1954).

To apply state law to the administration of a collective agreement, for example, "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Union v. Lucas Flour Co.*, *supra*, at 103. Similarly, to apply state law to economic pressures employed during negotiation of a collective agreement would inevitably exert a disruptive influence upon both the use of such pressures and the substantive terms of the agreement. The two are so interdependent that, to paraphrase, if a [state] "could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *NLRB v. Insurance Agents' International*, *supra*, at 490. This interdependence, coupled with Congressional intent to preserve the voluntary character of collective bargaining, explains why Congress deliberately refused to prohibit resort to those economic tactics which it did not affirmatively protect. Congress recognized that prohibition of resort to these tactics would necessitate a greater degree of control over the terms of collective bargaining than it desired:

"As the parties' own devices become more lim-

ited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations." (*Id.* at 490)

Indeed, Congress was so intent on preserving the free play of the economic pressures within the specific limits it itself set that it refused to authorize the National Labor Relations Board to become "an arbitor of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands" (*Id.* at 497).

Thus, Congress envisaged the use of economic pressures not, as Respondent appears to believe, as "a grudging exception" (*Id.* at p. 495) to its over-all scheme, but as an integral part of its scheme. It, therefore, intended that parties to a labor dispute may employ economic pressures which Congress neither protected nor prohibited, free from legal restraint but not free from "the economic consequences of its use" (*Id.* at 467). For "Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces." *Weber v. Anheuser-Busch*, 348 U.S. 468, 480. And, as part of this code, Congress intended that labor unions should be "... free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer. . . ." *Electrical Workers Local 761 v. Labor Board*, 366 U.S. 667, 672.

Indeed, as Professor (now Solicitor General) Cox pointed out:

"The precedents holding that a state may not grant a preventive remedy against conduct which is prohibited by the N.L.R.B. or which *may* be protected or *may* be prohibited are explicable only upon the underlying premise, sometimes expressed but also unarticulated, that the N.L.R.A. subjects employee organization and collective bargaining to a single uniform code of regulation." (Italics in original) Cox, *Proceedings of the ABA*, Section of Labor Relations Law, 12 at 19.

Hence,

"The total pre-emption of state laws dealing with unionization and collective bargaining, including resort to peaceful strikes and picketing, is consistent with the implications and philosophy of the N.L.R.A. whereas imposing additional obligations under state law, whether by injunction, criminal prosecution or damages, would often interfere with the working out of the national labor policy." (*Id.* at 20)

This Court expressed the same principle in *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767 at 774:

"[W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency."

In short, Ohio common law must yield because "Congress occupied this field and closed it to state regula-

tion." *Automobile Workers v. O'Brien*, 339 U.S. 454 at 457.

Moreover, in selecting which forms of economic pressure should be prohibited, protected, or permitted, Congress struck the "balance [it deemed appropriate] between the uncontrolled power of management and labor to pursue their respective interests." *Local 1976 Carpenters v. NLRB*, *supra*, at 100.

The Ohio common law upsets this balance by strengthening employers in a way not intended by Congress. For as this Court recently said in considering appeals to managerial personnel of secondary employers to support a primary dispute,

"Such an appeal would not have been a violation of § 8(b)(4)(A) before 1959, and we think that the legislative history of the 1959 amendments makes it clear that the amendments were not meant to render such an appeal an unfair labor practice." *NLRB v. Servett*, No. 111, October Term, 1963, Slip Op. p. 4 (Decided April 20, 1964).

For the balance Congress deemed appropriate to prevail, therefore, Ohio common law must give way. Otherwise, "the variegated laws of several states" shall displace the "single, uniform, national rule (*San Diego Building Trades v. Garmon*, *supra*, at 241) Congress sought and nullify Congressional "judgment in favor of uniformity." *Guss v. Utah Labor Relations Board*, 353 U.S. 1, at 11.

In sum, adoption of Respondent's position would authorize states to intrude in the process of collective bargaining, upset the balance between the rights of labor and management that Congress deemed appro-

priate, and destroy the uniformity Congress sought. For each of these reasons, the Ohio law must yield to paramount federal law.

IV. THE "TOTALITY OF EFFORTS" RULE PENALIZES PROTECTED ACTIVITIES

Respondent argues that the "totality of effort" rule is an application of the principle "that a wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 at 265. Under this principle, where damages cannot be measured with exactness and precision, the courts may assess damages on the basis "of just and reasonable inference, although the result may be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, at p. 563. Had the District Court applied this principle, it would have assessed damages based upon the "loss suffered as the result of Defendant's unlawful strike activity" (R. 276, Conclusion of Law No. 6), even if this loss could not be "measured with exactness and precision." Instead, holding that "the totality of defendant's efforts may be considered," the District Court assessed damages "based upon all loss suffered as a result of defendant's unlawful strike activity against the plaintiff and as a result of plaintiff's having fewer truck driving employees working during the strike than he would have had but for the combination of defendant's lawful and unlawful strike activity against the plaintiff" (Italics added. Conclusion of Law No. 6, R. 276). Thus, the Court assessed damages not upon an estimate of the loss attributable to Local 20's unlawful activities

but upon an estimate of the loss attributable to the "totality of defendant's efforts," that is, to the "combination of defendant's lawful and unlawful activities."

Contrary to Respondent, then, the "totality of effort" rule is not an application of an established principle of the law of damages but a new "principle" of labor law. This "principle" may be stated to be as follows: A union engaging in unlawful activities during a strike shall be liable for all loss flowing from the strike, regardless of whether or not such loss is reasonably attributable to the unlawful activities.

As we demonstrate in our main brief (pp. 38-44), such a principle conflicts not only with established principles of the law of damages but also with fundamental purposes of labor law. It should, therefore, be rejected.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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